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2 BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION
3 450 N STREET
4 SACRAMENTO, CALIFORNIA
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10 INTERESTED PARTIES MEETING
11 PART 5 GENERAL BOARD HEARING PROCEDURES
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15 REPORTER'S TRANSCRIPT
16 APRIL 5, 2006
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PART 5 GENERAL BOARD HEARING PROCEDURES

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1 450 N STREET
2 SACRAMENTO, CALIFORNIA
3 APRIL 5, 2006

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5 INTERESTED PARTIES MEETING
6 PART 5 GENERAL BOARD HEARING PROCEDURES

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8 MS. RUWART: Good morning everybody. My name
9 is Carole Ruwart with the Board's Legal Department.
10 Welcome to the interested parties meeting on Chapter 5
11 of the Revised Rules of Practice, General Board hearing
12 procedures.

13 As an initial matter, I would like to introduce
14 our two court reporters, Beverly and Juli.

15 If you would please, if you are in the room,
16 provide them with your name or a business card, if you
17 have one, so that they can get the spelling of your
18 name.

19 And also when you make a comment, at least the
20 first several times, if you could clearly identify
21 yourself so that they can attribute your comments
22 appropriately, that would be very helpful.

23 As the first matter, I would like to go around
24 the room and introduce everybody. Let's start with the
25 people on the phone.

26 MR. SHAH: Neil Shah with Board Member Claude
27 Parrish's office.

28 MS. CROCETTE: Sabina Crocette with Board

1 Member Yee's office.

2 MR. HERD: Also Jim Herd with Betty Yee's
3 office. And I think Tonya Reese is on the line as well.

4 MS. RUWART: Is there anybody else on the line?
5 Okay, thank you very much.

6 As I said, I am Carole Ruwart of the Board's
7 Legal Department.

8 MR. HELLER: I'm Bradley Heller with the
9 Board's Legal Department.

10 MS. MANDEL: Marcy Jo Mandel, State
11 Controller's office.

12 MR. DAVIS: Ken Davis, Franchise Tax Board.

13 MR. LANGSTON: Bruce Langston, Franchise Tax
14 Board.

15 MR. MICHAELS: Peter Michaels with Cooper,
16 White and Cooper in San Francisco.

17 MR. EVANS: Gary Evans, Board Proceedings.

18 MR. LO FASO: Alan LoFaso with Board Member
19 Betty Yee's office.

20 MR. KAMP: Steve Kamp with Board Member Betty
21 Yee's office.

22 MR. GILBERT: Arlo Gilbert with Fuel Taxes
23 Division.

24 MS. SIMPSON: Laureen Simpson with Taxpayer
25 Rights Advocate's Office.

26 MS. OLSON: Diane Olson, Board Proceedings
27 Division.

28 MS. MAHONEY: BNA Daily Tax Report.

1 MR. FINNEGAN: Patrick Finnegan of the Board of
2 Equalization, Excise Taxes Division.MS. ZIMMERMAN:
3 Sarah Zimmerman, SEIU Local 1000.

4 MS. SIBERT: Jeanne Sibert, Chairman John
5 Chiang's office.

6 MS. OLSEN: Joanna Olsen, of Franchise Tax
7 Board.

8 MR. RIVERA: Gus Rivera, Intel Corporation.

9 MS. ROZARIO: Karri Rozario, Deloitte Tax.

10 MR. FOSTER: Ian Foster, BOE Legal.

11 MR. AMBROSE: Lou Ambrose, BOE Legal.

12 MR. DALY: Charles Daly, BOE Legal.

13 MS. RUWART: Great, thank you very much.

14 For the introduction of the substance of this,
15 I will turn this over to Brad Heller.

16 MR. HELLER: Thank you very much.

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SECTION 5000.5015.1
COMMUNICATIONS WITH BOARD MEMBERS

5000.5015.1

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MR. HELLER: We're going to be discussing Part 5 today, which is actually now Chapter 5, which will be added to a new Division 2.1 of Title 18 of the California Code of Regulations. And the Part 2 and Part 5 had been revised and incorporate all of the comments that we received from the prior interested parties meeting and also incorporates some alternative language provided by some of the interested parties relevant to the communications with Board Members.

This morning we're hoping we're going to actually -- not hoping, we're going to start with the issue of communications with Board Members, Section 5000.5015.1 on page 25 of the redacted materials.

Then we're going to move from there to the disclosure of information relevant to a Board hearing. That starts with Section 5000.5033.

And then from there we're going to go -- take it from the top and start with the first section in Part 5.

And to begin with in Part -- to begin with Section, 5000.5015.1 on page 25, the first alternative has been staff's original proposal, which incorporates the Board's current policy, which is that Board Members

1 are open to their constituents, their subordinates and
2 other governmental agencies, true.

3 Go ahead, Peter.

4 MR. MICHAELS: Pardon me for the interruption
5 at the outset here, but when you say, "First
6 alternative," are these all -- all these alternatives
7 going be presented to the Board?

8 Or is there some -- is this an interested
9 parties meeting like in the past, where alternatives
10 would be reconciled their differences could be
11 reconciled and we end up with a consensus on a single
12 alternative?

13 MR. HELLER: Our goal would be to arrive at a
14 consensus on a single alternative, if that's possible.
15 And then on top -- then to essentially also to obtain a
16 full discussion of the alternatives.

17 What happened at our last meeting was that
18 alternative language came in just before the meeting. I
19 don't think all of the interested parties were able to
20 review all of that and discuss it at that particular
21 meeting, so, staff agreed at that time to go ahead and
22 incorporate that alternative language so that it could
23 be fully discussed at this meeting.

24 And as far as I know, we really haven't made
25 any decision on what we're going to present to the Board
26 Members, but basically at this point we're just trying
27 to get a full discussion of these different alternatives
28 so that everybody's point of view can be heard, with the

1 goal, of course, of reaching consensus, if it's
2 possible.

3 And then from there we'll work with our
4 executive management to determine what will be provided
5 to the Board Members. And I think that will depend a
6 lot on the kind of comments we receive and how much
7 support we have for the different alternatives.

8 MR. MICHAELS: One other prefatory comment?

9 Could you just update us on timing? Are we on
10 the same calendar we were on before or are we on a
11 different calendar?

12 MR. HELLER: For -- let me update everybody on
13 the calendar for the project.

14 And as of right now we're preparing Parts 1 and
15 2 to go to the Board Members on April 18th. And that --
16 those two parts were presented to the Board Members back
17 on January 31st and they had some comments and some
18 revisions they wanted us to consider.

19 Staff's made -- considered all those comments
20 and made several revisions. And we're going to present
21 those revised chapters on April 18th.

22 Then we're also preparing Chapter 3 and 4,
23 which are Property Tax and Appeals from the Franchise
24 Tax Board to be presented to the Board Members on
25 May 17th.

26 And then -- those dates are, I would say, very
27 firm for Appeals from the Franchise Tax Board and
28 slightly tentative for Property Tax.

1 And as far as Part 5 is concerned, the goal is
2 to present it to Board Members on June 27th. And as of
3 right now it appears to be on schedule for June 27th.

4 MS. MANDEL: I don't remember on the franchise
5 tax, was there a lot of dispute?

6 MR. HELLER: I don't think there was hardly any
7 disputed stuff.

8 MS. MANDEL: Okay.

9 MR. HELLER: Actually just some very minor --
10 minor changes that needed to be made.

11 MS. MANDEL: This won't affect the calendar?

12 MR. HELLER: That one is not going until June
13 and there is -- as far as I know, that's not a written
14 in stone date. So, it's -- the idea really is for staff
15 to achieve as much consensus as possible --

16 MS. MANDEL: Okay.

17 MR. HELLER: -- before presenting it to the
18 Board.

19 MS. MANDEL: But it wouldn't be any earlier?

20 MR. HELLER: No, it would no speed -- there's
21 nothing --

22 MS. MANDEL: Okay.

23 MR. HELLER: -- nothing will be speeded up,
24 absolutely not.

25 MS. MANDEL: Okay.

26 MR. HELLER: And also to address another issue
27 that's come up quite a bit is essentially staff is not
28 really going to have any cutoff dates for submitting

1 comments.

2 As far as when comments can be considered, if
3 they come in early enough, before the deadlines I have
4 just expressed so that we can consider them and actually
5 incorporate some kind of revisions into the language
6 that will be presented to the Board Members, then we can
7 go ahead and do that.

8 If comments come in after that, we'll still
9 consider them. We're going to go into the real formal
10 rulemaking process after the Board approves the
11 language. So, there'll still be time to receive and
12 consider comments at that point.

13 And if something really relevant comes along,
14 certainly staff wants to see that and be able to respond
15 as opposed to having a cutoff. So, really it's just a
16 matter of getting things in time for them to be
17 incorporated, not an issue of having a formal cutoff
18 that would prevent anyone from commenting.

19 So far all comments we have received have been
20 very good and we appreciate that.

21 So, really from today we're just trying to get
22 a full, well-rounded discussion, whatever comments there
23 may be on the revisions on Part 5.

24 And with that, I will go back to this
25 particular section, and then present Alternative 1,
26 which I was saying does present staff's original
27 proposal, with just a few modifications, one of which is
28 we determined that there are certain taxpayers who are

1 neither constituents, governmental agencies nor
2 subordinates of the Board, so we added "taxpayers" in
3 there so that it would be clear that for this particular
4 taxpayer who is a not a voter of some kind can go ahead
5 and communicate with the Board Members.

6 And then we also added the little -- we removed
7 the word "pending" and just clarified some of the
8 language at the end and added references to communicate
9 not with Board staff as well.

10 Then there is a --

11 MR. HUDSON: What page?

12 MR. HELLER: Page 25 is the redacted version.

13 MR. MICHAELS: Redacted which means --

14 MS. MANDEL: Redlined

15 MR. HELLER: Not redacted, thank you.

16 Thank you, Peter.

17 This is the strikeout, underlined version. And
18 there is no confidential redacted version out there --
19 no confidential version, no redacted version.

20 MS. MANDEL: Drop that no.

21 MR. HELLER: But anyhow, there's a strikeout
22 underlined and a clean version.

23 So, that would be on page 25.

24 Starting on page 26 is the second alternative.
25 And this was based on language that was provided by the
26 Franchise Tax Board's Chief Counsel at the prior
27 interested parties meeting. And Board of Equalization
28 staff and Franchise Tax Board staff worked together to

1 just essentially format that alternative into a
2 regulation that we just essentially have the same kind
3 of format and tone as the Board regulations.

4 That particular -- that alternative essentially
5 requires all -- all parties to an appeal from the
6 Franchise Tax Board to have notice and an opportunity to
7 participate in a communication with the Board Member.
8 And where a party doesn't participate, it requires that
9 the -- that the Board Member participating in the
10 communication prepare a written record essentially
11 containing the bare facts that a communication occurred
12 and the subject matter. That would be included in the
13 record of the oral hearing.

14 It also requires that written communications
15 between a party and a Board Member be provided to all of
16 the different parties.

17 And as it's also -- all of the provisions are
18 bilateral and apply equally to the Franchise Tax Board
19 as well as taxpayers appealing from the decision of the
20 Franchise Tax Board.

21 The third alternative, which begins on page 28,
22 was based on language submitted by SEIU Local 1000, and
23 it was slightly modified by staff to also -- to take on
24 the tone of a Board regulation. But it essentially
25 contains all the same parameters. And the main
26 parameters were that communications would be
27 prohibited -- were not prohibited, but basically that
28 there would be restrictions on communications starting

1 from the issuance of the public agenda notice.

2 And from that time on there basically would be
3 a record prepared of any communication that would be
4 disclosed on the record of the oral hearing. And those
5 restrictions would not apply once a case was taken off
6 calendar. Then the restrictions would re-apply once it
7 was scheduled for hearing again.

8 And going with that, we'll go ahead and start
9 out. I guess it would be best to just open up to
10 comments on all three alternatives since they probably
11 could be discussed in total.

12 And with that, I will open the floor if there
13 is any comments or questions or suggestions?

14 MS. ROZARIO: Karri Rozario for Deloitte Tax.

15 Just a point of clarification, Alternative 3
16 applies to both sales tax and SBE hearings and Franchise
17 Tax Board hearings?

18 MR. HELLER: Yes, thank you for mentioning
19 that.

20 MS. MANDEL: Does it apply every single time?
21 Anything?

22 MR. HELLER: Well, Alternative 3 would be
23 applicable to -- basically would be applicable to
24 property tax appeals, business taxes and fees and also
25 appeals from the Franchise Tax Board.

26 And it does have the added benefit of making
27 the procedures uniform across the board.

28 MS. MANDEL: What about the sales and use tax

1 appeals? Any kind of hearing?

2 MR. HELLER: Would include --

3 MS. MANDEL: Petition hearing?

4 MS. RUWART: Appeals hearing is what you're
5 talking about?

6 MR. HELLER: The local taxes are now
7 incorporated in Part 2. Although they still use the
8 same procedures, they basically are cross-referenced.

9 So, a hearing before the Board would be
10 conducted pursuant to these rules and --

11 MS. MANDEL: Okay.

12 MR. HELLER: -- and that would apply if it was
13 adopted by the Board.

14 MS. MANDEL: Thanks.

15 MR. HELLER: So, that on -- I'd also like to
16 point out that it essentially provides -- essentially
17 provides for communications with just a -- basically a
18 bare written record explaining that they occurred and
19 the date and time and a bit of the substance.

20 So, it's probably -- I would say although they
21 are ordered 1, 2, 3, probably I would take Alternative 1
22 as the least restrictive. Alternative 3 is probably the
23 next most restrictive. And then Alternative 2 would be
24 the most restrictive.

25 MS. MANDEL: And --

26 MR. HELLER: That's my opinion, so --

27 MR. AMBROSE: Lou Ambrose. For Alternatives 2
28 and 3, is there any consequences to not -- for not

1 following those?

2 MR. HELLER: Well, that's been a -- that's a
3 very good question. It's been a big issue with regard
4 to the Board of Equalization adopting its own
5 regulations on communications with Board Members.

6 Essentially if the Board adopts either
7 Alternatives 2 or 3, then the Board would be basically
8 in a position to enforce its own rules.

9 And so I think what we would have would be a
10 situation where the Board Members would simply choose to
11 comply with the regulation which they had adopted and
12 follow it.

13 But there is -- really does not provide for any
14 enforcement mechanism. And there is really --

15 MS. MANDEL: What -- I guess I was just -- I
16 don't know what other -- what general restriction on --
17 general impact on a Board member that might be, but I
18 suppose the Board Members will look into it.

19 MR. HELLER: That's correct.

20 Essentially, they -- staff -- essentially, at
21 this point, there is no third-party agency that the
22 Board can direct to oversee itself. And if it was to
23 create some entity within the Board, they would still be
24 subject to the Board.

25 So, I don't think there's necessarily a
26 separate policing mechanism here.

27 MR. AMBROSE: Not policing, what if somebody
28 found out after hearing, after the decision was -- I

1 mean, would that be grounds for a rehearing or --

2 MR. HELLER: I believe -- I think it would be
3 grounds for a rehearing -- assuming we got a petition
4 for rehearing within the time period before the decision
5 became final.

6 And, obviously, in a property tax matter that
7 would be final already.

8 MR. AMBROSE: Right.

9 MR. HELLER: But essentially -- or as far as
10 the Appeals from the Franchise Tax Board and business
11 taxes and fees cases, both of those would be a petition
12 for rehearing, any irregularity in the proceedings or
13 error of law would both be grounds for holding a
14 rehearing. I think the Board's failure to comply with
15 its own regulation would provide grounds as an
16 irregularity and provide for a rehearing.

17 MS. MANDEL: Almost the final --

18 MR. KAMP: One comment I would make, just
19 occurred to me, that in federal administrative law there
20 is a body of cases about ex parte contacts, which are
21 not permitted.

22 The presence of ex parte contact has resulted
23 in rulemaking being invalidated. Now, my question would
24 be if I suppose this -- if -- would the presence of like
25 these ex parte -- these Member communications here, if a
26 case goes to trial de novo, like a State assessee case
27 or a sales and use tax case in the Superior Court, would
28 these show up in the Board's records that would wind up

1 in Superior Court -- and might have an impact on how the
2 Superior Court judge would view the matter?

3 MS. MANDEL: You mean --

4 MR. MICHAELS: What are you talking about,
5 showing up, notes about meetings?

6 MR. KAMP: Yeah, notes about all these Member
7 communications that are -- that are required to be
8 memorialized by these rules.

9 MR. MICHAELS: What if the answer was yes, is
10 that a bad thing?

11 MR. KAMP: I don't know. I don't know if it's
12 good or it's bad. I think it's just a fact, but how
13 could it ever be good?

14 MR. HUDSON: You call up your Board Member and
15 you say, I'm being mistreated. And they say, "Well,
16 don't make that argument," but they put in their notes,
17 "He complained about this, this and this," and that's
18 now in the notes how could that be good if that comes
19 out at trial?

20 MR. MICHAELS: Because it's true, because it's
21 a fact, it's something that happened.

22 MR. HUDSON: May not be true, not necessarily
23 true, you know we're talking about a Board Member's
24 notes.

25 Have you ever seen a Board Member's notes?

26 MR. KAMP: No comment.

27 MR. HELLER: Just --

28 MS. OLSON: For the court reporters, could you

1 please introduce yourself --

2 MR. MICHAELS: Oh, yeah.

3 MS. OLSON: -- before you comment and please
4 don't talk over each other.

5 MR. HUDSON: My point is -- I'm sorry, Tom
6 Hudson, Bill Leonard's office.

7 My point in raising that is I think this is an
8 additional concern with creating a record of Member
9 communications, particularly if the record includes some
10 sort of content about your presentation that may be
11 different from what you present on the record and in
12 front of everybody.

13 There'll be questions about Board Member's
14 notes, about what you said in private. Are they
15 accurate? Do they really reflect the nature of your
16 case? Are they creating any kind of a bad record?

17 MR. HELLER: Well, just as a brief response, I
18 think to the extent there was a communication that was
19 then introduced into the record of an oral hearing,
20 which is essentially what's required both by
21 Alternatives 2 and 3 then that information certainly
22 would be in the record of a lawsuit that -- or a claim
23 for refund that proceeded to the Superior Court.

24 If there wasn't one it wouldn't necessarily be
25 in the administrative record itself, but it certainly
26 would be an issue that I'm sure a claimant could raise
27 as a basis for not giving the Board deference on its
28 decision.

1 But as far as what a specific court might do, I
2 mean I tend to think if the Board's decision was correct
3 on the merits of the case in first place, the fact that
4 there might have been a communication still might be
5 harmless if they made a specific decision.

6 But I do think it could be -- you know, it
7 could be it quite shocking for a particular taxpayer to
8 find out that all of the information they discussed with
9 their Board Member might be in the record of a public
10 proceeding one day and I definitely agree with that.

11 MR. KAMP: Steve Kamp, Board Member Yee's
12 office.

13 I also note that even quite apart from that
14 being be public records anyway, that means they could be
15 disclosed to in anybody who writes that.

16 MR. HELLER: That's correct.

17 MR. LO FASO: Al LoFaso, Betty Yee's office --
18 I think I gave you a card.

19 I am still unclear what goes on the public
20 record. And I am intrigued by Steve's questions, but
21 I'm assuming that what goes up to the court as part of
22 the record is going to be what's in the record.

23 And just because it's a public record doesn't
24 necessarily mean it's going to get into the record. I
25 understood that the fact of the communication has to be
26 disclosed in some way, but I'm a little unclear as to
27 what -- where we are on content.

28 MS. MANDEL: It sounds like it depends. You

1 can talk about the two provisions, what would have to go
2 into the Board's record of hearing, which would be the
3 official record kept by Board Proceedings, would be
4 whatever that is laid out in the Alternatives 2 and 3,
5 which we can talk about whether they require your actual
6 handwritten notes or whether you have to prepare a
7 document that says, "I spoke to so and so on such and
8 such a day. He talked about case X," or more than that.

9 And for when you go to court, everything out of
10 the Board of Equalization is trial de novo and people
11 may generally put in everything from the administrative
12 record. But since it's a total trial de novo on
13 evidentiary, not just a trial de novo independent -- you
14 know, sort of review of a record with an independent
15 legal judgment, it's totally new.

16 So, evidence that may be -- they didn't have
17 any evidence of any kind, even if it wasn't before the
18 Board, can come in on -- on all of the cases that go
19 into court.

20 But as far as somebody taking the whole record
21 that was before the Board, what would actually be in the
22 record, as opposed to one of the other things people
23 could do, if they wanted to in their tax case is do a
24 Public Records Act request of the Board, which would
25 include things, potentially, other than what is in the
26 record.

27 So, what's the difference -- what's the
28 specifics of what goes into the public record of the

1 hearing under 2 and 3?

2 MR. HELLER: The difference is essentially --

3 MS. MANDEL: What goes in under 2? What goes
4 in under 3?

5 MR. HELLER: There are some substantial
6 differences.

7 I think under Alternative 2, from the Franchise
8 Tax Board's Chief Counsel, I believe it's in
9 subdivision (b)(2), starting on page 26, that explains
10 what a record of an oral communication with the Board
11 Member would look like.

12 And it basically says it would include a date,
13 time and location of the communication, a caption of the
14 subject appeal, so we could identify which appeal was
15 being concerned, and a description of the communication,
16 which essentially both Franchise Tax Board staff and I
17 think Board staff have chosen not to overdefine in an
18 effort to allow the Board Members to get a comfort level
19 with what is -- what's sufficient to provide people with
20 notice for their hearings as opposed to trying to
21 provide a laundry list of details that may or may not be
22 relevant to any particular hearing.

23 And then a copy of any written materials that
24 are provided in conjunction with the communication. So,
25 if there's letters or exhibits or something that are
26 provided while they're discussing the case, and the
27 names of the persons who are participating.

28 And then to answer Alan's questions these would

1 be entered into the record of the oral hearing and
2 become a public record as part of that and it would also
3 become a part of the case file, as far as we're
4 concerned.

5 And as Marcy indicated, all that would be fair
6 game as far as a claim, introducing it as evidence, to
7 the extent it's relevant, and that is in suit in the
8 Superior Court, since it's a trial de novo.

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1 MS. MANDEL: Okay. Before you go to number 3,
2 what Tom is talking about then gets into this (C)(2) --
3 (2)(C), Description of Communication.

4 MR. HELLER: Right.

5 MS. MANDEL: So, one person might take a lot of
6 notes during a meeting or a phone call and find it easy
7 to slap a caption page on it and put all that in. That
8 might be what they just do.

9 One person might have a more -- you know, they
10 might have a format where they just have, you know,
11 "Spoke to so and so on such a day, such and such a time
12 by -- by phone or in my office on this appeal. They
13 wanted to talk to me about their concerns of, you know,
14 how they felt staff was wrong."

15 That's a description of the conversation.

16 MR. LO FASO: Agreed.

17 MS. MANDEL: So, that's -- it's -- it depends
18 what goes into that record, depends on -- and that's the
19 part that they left, because how -- how can you specify
20 what the description is?

21 Some people, you know, take notes. Some people
22 don't take notes.

23 MR. HELLER: And I think that -- this is
24 Bradley Heller again. Just to add, I mean the idea was
25 to provide some sort of disclosure so that a litigant
26 arriving at a Board hearing would be aware of the
27 communication and whatever important information there
28 would be relevant to that hearing that they now have to

1 present their case at.

2 But as far as trying to, you know, specify
3 exactly what information might be relevant on a -- in a
4 broad way that would apply to every single case was --

5 MS. MANDEL: But if they give you -- if they
6 came in and gave -- gave you an Executive Summary or --

7 MR. HELLER: Sure.

8 MS. MANDEL: -- a picture or something, any of
9 that written stuff that they give would --

10 MR. HELLER: Right, yes.

11 MS. MANDEL: -- go in. I mean, we always -- I
12 always get that, anyway. It would go in.

13 MR. LO FASO: And presumably this caption,
14 these -- these -- this description of this -- this
15 written exhibit is given over to Board Proceedings to be
16 put in the appropriate file and -- and, question mark,
17 also sent to the other party, question mark.

18 MR. HELLER: This one would -- would be
19 provided to all the parties. Well, it would be a full
20 public record, so--

21 MS. MANDEL: No, no, no, no.

22 MR. HELLER: I'm sorry.

23 MS. MANDEL: He -- it is a full public record.

24 MR. HELLER: Oh.

25 MS. MANDEL: But -- okay, we -- we have a
26 meeting with --

27 MR. HELLER: Which one are we talking about?

28 MS. MANDEL: We're talking about what happens

1 probably on both of them, but start with FTB.

2 MR. HELLER: Okay.

3 MS. MANDEL: I have a meeting with somebody. I
4 do my little description thing. What do I do with it?
5 I give it to Board Proceedings. And then Board
6 Proceedings does what, just stick it in the file?

7 No, Board Proceedings then gives it to all
8 other Board Members and the parties. That's what he's
9 asking. Where does it go?

10 MR. LO FASO: Yes, that's what I'm asking.

11 MR. DAVIS: (b)(2).

12 It's in number 3.

13 MS. MANDEL: Number 3?

14 MR. DAVIS: Number 3.

15 MR. HELLER: Well, it's really -- yeah, it's
16 basically just entered on the record.

17 MS. MANDEL: Well, it says, number 3 -- well,
18 you guys, you know where it is.

19 MR. HELLER: Public Record of the Appeal.

20 MS. MANDEL: Because that's what Alan's asking.

21 MR. HELLER: (b)(3) -- it's in (b)(3), on page
22 27, is that correct?

23 MR. LANGSTON: Yeah.

24 MR. DAVIS: Ken Davis --

25 MR. HELLER: And also --

26 MR. DAVIS: -- with the FTB. Let me maybe
27 explain the process a little more as at least Brad and I
28 worked through it.

1 Once the communication log in number 2 is
2 developed, then the -- then you proceed to number 3, and
3 that is, "The public record of each oral communication
4 be provided to all of the Board Members and all will of
5 the parties prior to the oral hearing."

6 Then the issue is raised, well, what happens if
7 a record is not made of the communication? A Board
8 member forgets, okay. Or it's close in time to the
9 hearing.

10 Well, then you drop to number 4.

11 And number 4 is really the catch-all, and that
12 is, "Prior to the commencement of an oral hearing on the
13 deliberation of the matter, the Chief of Board
14 Proceedings shall ask the Board Members whether they
15 received any communications that are required to be
16 placed in the record."

17 So, that's the catch-all. If there's no
18 oral communi -- if there's no written record prepared
19 then the Chief of Board Proceedings asks prior to the
20 hearing, much like the --

21 MS. MANDEL: Not the disclosure --

22 MR. DAVIS: -- the disclosure --

23 MS. MANDEL: Contribution disclosure.

24 MR. DAVIS: Yeah, the contribution disclosure
25 statement, and the Board Member just states on the
26 record what the -- time and place and parties and -- and
27 the short subject.

28 That we understand is also how the -- one of

1 the other agencies that was referenced by the Chief
2 Counsel does, as well. The BCDC, Bay Area Conservation
3 Development Commission.

4 MS. MANDEL: I just have a question then or
5 perhaps a point for you to consider when -- if this goes
6 forward.

7 The Board Members cannot communicate with
8 all -- each other on a matter. So, typically -- and I
9 don't know if that has to do with only -- you might want
10 to look at the procedures that we have. If something is
11 on an agenda and we want to do a memo to all the
12 members, we can't do that, but we do a memo that goes to
13 Board Proceedings for distribution. And then we're not
14 supposed to talk to each other about it.

15 So, you might want to look at the procedures
16 that were developed there and whether that happens once
17 it's -- because I -- this idea that this -- this (3)
18 makes it look like if I do a -- something, then I send
19 it to all the other Members. And there might be a
20 restriction on it being done that way --

21 MR. HELLER: That's true.

22 MS. MANDEL: -- or only once it's on an agenda
23 and somehow that should be incorporated. So, if we're
24 doing these things, if this is what goes forward --

25 MR. HELLER: Right.

26 MS. MANDEL: -- we -- you know, we're not
27 violating anything. That will (inaudible) how we do it.

28 MR. HELLER: Okay.

1 MR. DALY: Charles Daly, BOE Legal.

2 Is the phrase "Board staff" and "Board Member
3 staff" intended to be interchangeable?

4 MR. HELLER: No. "Board Member Staff" are a
5 specific staff of a Board Member, and "Board staff" is
6 really the staff of the -- of the Board of Equalization.
7 So, there's -- they are not mutually exclusive.

8 MS. RUWART: They are mutually exclusive.

9 MR. HELLER: Oh, they are? I'm sorry.

10 MS. RUWART: They are mutually exclusive.

11 MR. HELLER: They are mutually exclusive.

12 MR. MICHAELS: They're not the same.

13 MS. MANDEL: You didn't get enough sleep last
14 night.

15 MR. HELLER: I need to bring a dictionary with
16 me next time. I apologize to everyone. Again.

17 But, yes that's -- there is a distinction there
18 and there should be -- as we go back through it there
19 are some definitions that are provided in, I believe,
20 Section 5000.5002.

21 MS. ROZARIO: Brad, this is Karri Rozario.
22 "Board Member Staff" is not defined in -- in your list
23 of definitions. It's just "Board Member," "Board
24 Staff". So, we may want to add that definition for
25 clarity.

26 MS. RUWART: Yes, Tom.

27 MR. HUDSON: Tom Hudson, Bill Leonard's office.
28 I also -- one thing I have not heard in this entire

1 process is anything from the proponents on the SEIU
2 proposal. Is there anybody here to talk about that?

3 MS. ZIMMERMAN: I had my hand up, so glad you
4 asked.

5 So, one of the things that hasn't actually been
6 raised yet in our proposal -- but first I want to say
7 that this is a great process, and I'm -- I'm excited to
8 be part of it. Here's my card.

9 I think there's a lot in the second alternative
10 that we also support, and that there's a lot of -- there
11 are -- that we're ready to look at after today, ways of
12 combining some of those -- the aspects of Alternative 2,
13 as well.

14 One of the things that wasn't raised or pointed
15 out yet in our proposal on page 28, is my version of
16 Alternative 3(d), was that initially when we had been
17 talking about this -- we've been looking at this for
18 over a year, and there was some thinking about making a
19 postponement automatic if there had been an ex parte
20 communication. And so we moved off of that in this
21 proposal, and then there's a discussion, you know,
22 introducing a lot more flexibility on the Board's part
23 for deciding if there should be a postponement or not.

24 Because a lot of times there's inadvertent
25 communication, there's small taxpayers that may come up
26 and that, you know, a -- a lack of flexibility then
27 you're either inadvertent, or it could even give the
28 taxpayers control over postponement of hearings. So

1 that it really was important to introduce that
2 flexibility on behalf of Board Members to make that
3 determination in the recommendation.

4 MS. MANDEL: And your proposal has to do with
5 inside the agenda -- once the agenda notice is issued?

6 Huh-oh. So, it's -- it's that close time
7 period.

8 MS. RUWART: Hello, is there someone new on the
9 line?

10 MR. SHAH: I'm sorry, no.

11 MS. RUWART: Okay.

12 MR. HELLER: Thank you.

13 MS. ZIMMERMAN: And I think if there is an
14 additional language in terms of additional flexibility
15 for the Board, that's something we all want to hear from
16 the folks who are -- you know, want to include in
17 this -- in this version if it does, if there is a
18 decision to put this before the Board.

19 I think, also, you know, going to the point
20 that Marcy, I think you were raising, was if there
21 are differ -- there are other particular types of
22 appeals that you think should be exempt from this, that
23 are less regulatory and more administrative, for
24 example, that definitely we would be interested in
25 hearing about that, as well.

26 I think that -- you know, that -- that
27 it's important to hear some of the concerns raised today
28 and also to respond to them. It sounds like

1 that example -- the question about whether there's a
2 need to have examples of particular types of disclosure
3 has been addressed. And that's not something that we
4 need to -- to work on.

5 Anything further? I -- I do think that
6 something that has -- again, hasn't been raised today,
7 but we have heard in this process, is that the way the
8 Board currently operates, often -- once an item gets on
9 the agenda, is the first time that people really pay
10 attention it, on both the Board side and the -- the
11 tax -- the taxpayer side, litigant.

12 And I think that there is a question of is
13 there a need for creating more opportunity in a -- at
14 least in a public way, to have more time than what's
15 currently available in the hearing, itself. And that
16 often through an ex parte becomes the place -- the only
17 place where people get time to review details before the
18 hearing.

19 And so, you know, I certainly don't want to say
20 that this necessarily covers all those aspects because
21 there may be additions we need to make in terms of
22 addressing the fact that there's a very short time right
23 now for Board Members to hear some of those cases that
24 may -- that we need to look at additional time. But I
25 think that our problem is that right now we certainly
26 want this -- the exchange, the documents, the
27 information, to be made public. And that we don't think
28 that a completely closed process is the way to address

1 that issue of getting more time to discuss the merits of
2 a case.

3 So, that's really what's behind, you know, the
4 interest on this. We certainly also -- you know, we
5 represent, you know, thousands of folks that work for
6 the BOE and the FTB. We're also concerned, you know, to
7 represent taxpayers effectively in this process.

8 So, you know, we have a lot of different
9 interests.

10 MR. HELLER: Alan, please.

11 MR. LO FASO: That gentleman over in the corner
12 wants to speak, so I'll defer.

13 MR. RIVERA: Gus Rivera of Intel Corporation.

14 I'm also here representing the Silicone Valley
15 Leadership Group. I know, Brad, you probably received a
16 letter in the past from us in -- in support of -- of
17 Alternative 1 and so really I'm here just to reiterate
18 the -- our strong support behind Alternative number 1.

19 We do believe that, you know, this -- that the
20 Board should be compared to a commission. This is a
21 publicly elected -- these are publicly elected
22 officials. And we feel that the communication should be
23 open and remain as it is.

24 We know that -- you know, as was just mentioned
25 there's only a few minutes that a taxpayer has and -- to
26 make a case on behalf of the Board, and we want to make
27 sure that, you know, the Board Members are making
28 informed and fair decisions. And we don't want to take

1 away from that.

2 MR. HELLER: Yes, I did receive those -- that
3 letter and shared it with all the staff and the Board
4 Members. And I also included a -- pretty -- posted a
5 matrix showing all the comments I received and how they
6 were incorporated in this draft. That was posted on the
7 internet. And it shows those comments and we appreciate
8 it. And go ahead, Alan.

9 MR. LO FASO: I appreciate it, Brad. I want to
10 go back to Alternative 3 and --

11 MR. HELLER: Sure.

12 MR. LO FASO: -- I appreciate how you laid it
13 out, but what I'm concerned about -- well, what I don't
14 understand about Alternative 3 is it says you shall not
15 do it, and here's what it is, but if you do it, ta-da-a,
16 ta-da-a, ta-da, so I guess I'm -- is it really the
17 intent that the communications don't occur, or is it
18 really the intent that if the communications occur
19 they're disclosed and then people have the opportunity
20 to seek more time, et cetera, et cetera?

21 MR. HELLER: Well, I think really the goal
22 is --

23 MS. MANDEL: Well, why don't you let her --

24 MR. HELLER: Go ahead.

25 MS. MANDEL: -- answer --

26 MR. HELLER: Sure.

27 MS. MANDEL: -- because it's their proposal.

28 MR. LO FASO: Am I -- am I making sense?

1 MS. ZIMMERMAN: Yes. Absolutely.

2 MR. LO FASO: Okay.

3 MS. ZIMMERMAN: You know, I think that the goal
4 is for there not to be the communication during the
5 short period prior to a hearing, without there --
6 disclosure. So that if that happens, it's not that -- I
7 guess the question is how do you define it. And
8 communication is defined on proxy to a hearing. Which
9 is why we have the postponement. So that, yes, the goal
10 is for there not to be, you know, communication that's
11 not public directly prior to a hearing, without giving
12 all parties a chance to be informed in response.

13 It's an issue of time -- timing as opposed to
14 keeping people from talking to each other. Does that
15 make sense?

16 MR. LO FASO: I think so.

17 MS. ZIMMERMAN: Okay.

18 Brad, you want to add to that?

19 MR. HELLER: No, I think that's pretty
20 accurate. That's your, you know -- your own statement
21 about it, so --

22 MS. ZIMMERMAN: Thank you.

23 MR. HELLER: Go ahead, Tom.

24 MR. HUDSON: Tom Hudson, Bill Leonard's office.
25 I guess an issue I'd thought of too much before today,
26 but when we talked about there's really no compliance
27 mechanism to make sure that all the Board Members are
28 actually doing this, that -- that kind of raises a -- a

1 whole new issue that I never thought about, which is,
2 you know, you have five Board Members and two of them
3 are following this, you know, very strictly and three of
4 them aren't paying any attention to it, is that kind of
5 a fairness issue for taxpayers, that -- you know, if
6 some -- some Board Member says, "Gee, in the last few
7 hours before a hearing I don't have time to write out
8 these long disclosures, who I talked to and what they
9 said and who was in the room when we talked and all
10 that," and they just ignore it.

11 And what -- what does that do for the -- the
12 process when you have basically two different systems in
13 place?

14 MR. HELLER: Well, I think one, you know, we
15 definitely -- it definitely would be an issue of
16 fairness if there were Board Members who weren't
17 following the regulation. However, in all my
18 discussions with interested parties I've really taken a
19 position that the Board Members will follow regulations
20 if they duly adopt one, and that generally, you know, I
21 have the good faith to believe that they're going to
22 follow it if it's on the books and they're aware of it.
23 And we're going to have the Chief of Board Proceedings
24 poll them before a meeting to make sure that they're
25 just not forgetting.

26 But, honestly, there's -- there would be an
27 issue of fairness, and there's not a mechanism to
28 enforce -- necessarily enforce these regulations by

1 Board staff, if the Board Members chose not to go ahead
2 and comply with them voluntarily.

3 So, I do think there could be a fairness
4 concern and it could also raise those litigation issues
5 that we were discussing before, which is that it could
6 add the element of some -- some, you know, deviation
7 from our own established procedures. In the different
8 administrative process that might -- it might deprive us
9 of some deference at the judicial level. But I think
10 those are all valid concerns.

11 Go ahead, Steve.

12 MR. KAMP: Steve Kamp from Board Member Yee's
13 office. Question regarding Alternative 3, subdivision
14 (b) sub-subdivision (2), and it says, "A communication
15 is described in this paragraph if: (A) The
16 communication occurs directly between a Board Member and
17 an employee of the FTB, a Board employee that is not
18 assigned to a Board Member staff, or a taxpayer."

19 My question is what about if the communication
20 is made by a member of a Board Member staff acting -- or
21 made by the Deputy Controller for Taxation?

22 MS. MANDEL: Well, in -- in the definitions of
23 Board Member I'm a Board Member for that purpose.

24 MR. KAMP: Okay.

25 MS. MANDEL: So --

26 MR. KAMP: But then the next question --

27 MS. MANDEL: Or -- or whoever is --

28 MR. KAMP: Then that's interesting because the

1 next question I have then, Board Member staff
2 occasionally communicate on behalf of Board Members.
3 It's been known to happen. So --

4 MR. HELLER: That's a great question, too, and
5 that was something also where SEIU was -- was willing to
6 be flexible and not try to create a rule that was going
7 to nail down every possible conversation.

8 MR. KAMP: Okay.

9 MR. HELLER: And to really stay within the --

10 MR. KAMP: All right.

11 MR. HELLER: -- the spirit of what they're
12 trying to accomplish. So, they really wanted to say
13 that they're really concerned with where -- with direct
14 access to a Board Member.

15 MR. KAMP: Okay. That's -- that's fair --
16 that's good. That's good to know that's -- that's your
17 intent, Brad?

18 MR. HELLER: Well, I think -- yes, that was my
19 understanding.

20 Is that correct, Sarah?

21 MS. MANDEL: Well, when we get to definitions,
22 it just makes everything all tangled up because of
23 course there are quite a number of people who have a
24 title that involves Deputy State Controller. There are
25 very -- there are like only two of us who are authorized
26 to sit on the Board, one of whom does not have that
27 title, but is the Chief Counsel.

28 So -- so , I don't know, we'll have to talk

1 about what we -- you know, what we do.

2 I mean, for the purposes when he sits over
3 here, he is deputized for the State Controller. But if
4 you were looking at his title -- so we'll have to talk
5 about that later and figure out how you --

6 MR. HELLER: Right.

7 MS. MANDEL: -- make sure you're referring to
8 the people you mean to refer to.

9 MR. HELLER: There could be -- I'd be happy to
10 use whatever language --

11 MS. MANDEL: Yeah, okay.

12 MR. HELLER: -- is agreeable with the
13 Controller's office. We definitely want to describe
14 the -- the participants accurately.

15 Let's see. Okay. Well, I think that kind of
16 rounds out --

17 MR. HUDSON: One -- one last question. And as
18 far as these disclosures that take place at the Board
19 meeting, itself, what -- from the proponents, I'm
20 curious what -- what is the purpose of that? If the
21 Board meeting starts and we hear that there was an oral
22 communication, and that's the first notice anyone gets.
23 I'd like to hear more about what the purpose of that is.

24 MR. HELLER: Well --

25 MS. MANDEL: From the proponents.

26 MS. RUWART: If you would like to hear --

27 MR. HELLER: Oh, sure, certainly. I'll add
28 something. This was --

1 MR. DAVIS: Ken Davis.

2 I -- I believe the -- the Chief Counsel's
3 intent behind the whole -- the whole proposed
4 regulation, the premise is -- is open -- openness and
5 disclosure to all Board Members and the parties. And
6 so, it's -- so that the -- the Board Members at least
7 hear generally any -- and I use the word "generally"
8 specifically. So, the Board Members hear generally
9 about any outside communications, and that the parties
10 hear about those outside communications, and that the
11 parties at the time of the hearing have an opportunity
12 to comment upon the -- the subject matter of those
13 outside communications.

14 One of the differences in Alternative 2 versus
15 Alternative 3 is Alternative 2 doesn't -- doesn't
16 provide or is silent as to the postponement of a hearing
17 because there may be some communications that are with
18 outside -- outside the Board hearing room that are --
19 that are not material.

20 And -- and so, we didn't -- or so that the
21 regulation was drafted so it was not a requirement to
22 have an automatic postponement. But if the subject
23 matter of the -- of the outside communication was -- was
24 clearly of a major substance, then the -- the party at
25 that time could request a postponement.

26 But the regulation at least was silent on it.
27 So, the whole goal was really openness and -- to the
28 Board Members and to the parties so that they could

1 comment at the time of the hearing. But for the hearing
2 to go forward.

3 MS. RUWART: Alan.

4 MR. LO FASO: Well, since we're all turned to
5 2, I -- I want to get a little bit more perspective from
6 the FTB on participation in general. I mean, I read
7 this a while back, but as I basically understood it if
8 Taxpayer X wants to talk to us we call you. Taxpayer
9 wants to talk to us, come on down, let's have a meeting.
10 If you come down and talk to us with Taxpayer X we're in
11 compliance and we're pretty much done.

12 That only of course works if you all want to
13 come down and talk to us. And I'm not fully apprised of
14 the issues that came up, but just -- just -- would you
15 just comment on your thoughts about participating under
16 that provision of Alternative 2?

17 MR. LANGSTON: I can address that.

18 Yes, I think you're exactly right. The whole
19 point of the ex parte communication issue is, as in
20 Court, to avoid the idea that one side has the ear of an
21 adjudicating person, and the other one is not present to
22 point out the issues.

23 I think in our last -- if you were here for the
24 Part 4, we talked about the prehearing conferences that
25 are proposed. And this is the same sort of spirit.

26 If there -- if they went to brief a Board
27 Member beforehand, get both sides of the story. I can't
28 imagine why a Board Member would not want to do that.

1 Same thing here, if -- if one side is not able
2 to be there, at least say, "What did you talk about?
3 What evidence did they present?" You know, that sort of
4 thing, because it's going to be relevant in the hearing.

5 So -- so that's the idea behind all this, is --
6 you know, if -- if these communications are going to
7 happen, then at least both sides should be present.

8 And I -- I don't think that's unreasonable.

9 MR. MICHAELS: Has there been any thought given
10 to their requirements that the FPPC and -- well, you
11 would know, Steve, better than anybody, probably -- I
12 may have this wrong, but of lobbyists who have X --
13 so-called, quote-unquotes, lobbyists who have so many
14 contacts or -- with -- with an elected official or a
15 member of the staff of an elected official have to
16 register and --

17 MS. MANDEL: Yeah, but that --

18 MR. MICHAELS: -- fill out all kinds of
19 paperwork. Is there any consideration that by creating
20 these -- we're creating a road map for hundreds of
21 people probably to be now in the radar to become
22 registered lobbyists or get in trouble.

23 MS. MANDEL: Well, I -- if I remember
24 correctly, maybe -- maybe Steve has looked at this more
25 recently, because I used to be a registered lobbyist,
26 but that was because it has to do with regulations.
27 Not -- not cases, but regulations.

28 So the definition of lobbyist I think has to do

1 with legislative matters, which would be -- you know,
2 bills up at the Legislature or regulations. And the --
3 the issue that comes up where, you know, we used to
4 think, well, there's some people who maybe ought to be
5 registered was on regulatory matters.

6 But I don't think it has anything to do
7 with things beyond legislative/regulatory matters.

8 MR. KAMP: Steve Kamp. There is an FPPC
9 definition, it may be a Political Reform Act statutory
10 definition, but I think it's a certain number of
11 contacts per month. It's designed to influence
12 legislative or perhaps governmental action, but it would
13 not surprise me if there is an FPPC advice letter or
14 published opinion that may exempt the practice of law
15 from that.

16 But, again, it's -- you're -- I think what
17 Mr. Michaels is saying is correct. Is you are leaving
18 out a road map that somebody who may inadvertently end
19 up becoming a lobbyist, and I used to know some law
20 firms that don't want to become registered lobbyists.
21 And they structure their advocacy to do exactly that, or
22 not do exactly that.

23 MR. HELLER: Well, from staff's point of view,
24 we really did not look at that issue yet. So, as far as
25 we were concerned, we were much more concerned with --
26 with flushing out the issue how people would communicate
27 with Board Members and did not reach the secondary issue
28 of the consequences of somebody who communicates quite

1 often with Board Members.

2 So, it's something we can definitely take a
3 look look at as far as just properly advising the Board
4 about the consequences.

5 MR. MICHAELS: Well, there are serious
6 sanctions for people who are supposed to be lobbyists,
7 but aren't.

8 MR. HELLER: Absolutely.

9 MR. MICHAELS: And so, if we're creating
10 lobbyists inadvertently we ought to at least do that
11 eyes wide open.

12 MR. HELLER: I'll take a look at that.

13 MS. RUWART: Are there any further comments on
14 these issues? Yes, sir.

15 MR. LO FASO: Actually, I have -- I have a
16 follow on -- with Bruce and Ken. I -- I clearly got
17 your answer if -- if you're invited to come talk to the
18 other party, you'll come. Some -- to deal with the
19 whole of Alternative 2, some factors under this might
20 prefer to hear from one party in one meeting and another
21 party in the other meeting, because sometimes people
22 think that people speak a little bit more freely in
23 separate venues.

24 Under that option, if I -- if I understand it
25 correctly in Alternative 2, can you elaborate on FTB's
26 views on participation.

27 MR. DAVIS: Yeah, I -- I think if you're -- if
28 you're asking how we -- how we think this is to be

1 applied --

2 MR. LO FASO: Uh-huh.

3 MR. DAVIS: -- if the -- if there is a meeting

4 set up -- if it's a conference call between a party and

5 a Board Member, or Board Member staff, then FTB would be

6 invited to be on the conference call.

7 MR. LO FASO: Here's my hypothetical.

8 MR. DAVIS: Please. Okay.

9 MR. LO FASO: Party X wants to talk to us. We

10 want to meet with Party X on Monday. We're going to

11 disclose. Will you come meet with us on Tuesday and

12 talk about what Party X told us about?

13 MR. MICHAELS: Now -- now who's coming to that?

14 MR. LO FASO: Party X -- Party X is the

15 taxpayer.

16 MS. MANDEL: The taxpayer.

17 MR. MICHAELS: Yeah, I understand that. But

18 who's the "will you come" --

19 MS. MANDEL: FTB.

20 MR. MICHAELS: I see.

21 MR. LANGSTON: That's -- I think it's fair to

22 say that's not provided for in this --

23 MR. MICHAELS: Correct.

24 MR. LANGSTON: -- scheme.

25 MR. LO FASO: No, it's not.

26 MR. LANGSTON: No, if you read it, it -- it

27 pretty clearly -- there's -- the -- the idea is that

28 prior to any oral communication the Board Member shall

1 contact all parties.

2 MR. LO FASO: Correct.

3 MR. LANGSTON: And invite them. Well, now
4 you're asking if FTB either declines or you're saying
5 they don't want to invite FTB at all?

6 MR. LO FASO: Or they want to invite FTB on
7 another day.

8 MR. LANGSTON: Well, that's the same as not
9 inviting them at all to the meeting.

10 MR. LO FASO: Fair enough. Fair enough.

11 MR. LANGSTON: You know, to -- my feeling is
12 that would be two separate meetings under this.

13 MR. LO FASO: Uh-huh.

14 MR. LANGSTON: And in theory, at least, to
15 comply with the reg -- with the proposed regulation you
16 would have to -- you would have to invite FTB to the
17 first meeting, invite the taxpayer to the second
18 meeting.

19 Now, I -- I don't know -- I mean, we're
20 starting to get into hypotheticals here.

21 MR. LO FASO: Uh-huh.

22 MR. LANGSTON: -- about what would happen if
23 you communicated to FTB, gee, the taxpayer would really
24 rather you not be there, and they don't -- they agree,
25 they don't want to be there for the next meeting. I
26 think you could be -- you know, that -- that would
27 depend on the facts and circumstances of the case.

28 But to be fair -- to answer your question

1 specifically, no, that is not provided for in Option 2.

2 MS. RUWART: And, Bruce, can you maybe explain
3 why that wouldn't -- why his option wouldn't be provided
4 for. That it sounds like it's at the option of the
5 Board Member or Board Member staff, they prefer to
6 receive their information in this format.

7 What objection do you have to that?

8 MR. LANGSTON: The -- the thought behind it --
9 I mean, the basic idea of all parties being present is
10 so that we could listen to what the taxpayer says and
11 make comments. Rather than have their comments come in
12 in our absence, maybe be told about them later or maybe
13 not.

14 But in any case, we may -- as with all hearings
15 and proceedings, I mean that's why both parties are at
16 the -- at the public -- at the public hearing, is so
17 that often we listen to what the taxpayer is saying, we
18 don't wait for questions to be asked of us later. You
19 see what I mean?

20 That's -- that was the idea. So, that's really
21 the answer, is -- so that -- so that both parties could
22 actually listen to what the other party is saying
23 as opposed to having it filtered through the Board
24 Member.

25 MS. MANDEL: Let me -- let me give you some
26 practical -- I mean, I -- I appreciate these
27 alternatives. I understand why they're being presented.
28 But in real life, I mean if the taxpayer calls for a

1 meeting, it's easy to see how that would flow through
2 these different alternatives.

3 Sometimes you might get a phone call. You
4 know, I pick up my own phone. Other Board Member staff
5 pick up their own phones, presumably. They may pick up
6 the phone and it's, you know, Taxpayer X or
7 representative for Taxpayer X. "You got a few minutes?
8 I went to talk to you about -- my case is coming up, you
9 know, next week."

10 Under these we'd have to say, "Can't talk to
11 you now, must hang up the phone, must schedule a time to
12 bring in the other side or see if the other side" -- you
13 know, I may be mixing up the examp -- the two
14 alternatives. But that's what you'd have to do if you
15 got that call.

16 But here's another thing that happens. Of
17 course, I suppose the concern -- primary concern from
18 Franchise Tax Board is probably really communications
19 with taxpayers, because that's what they're most aware
20 of.

21 But here's an example that happened several --
22 a while ago. I am somewhere. A legislative staffer
23 walks up me and says, "Is the such-and-such case coming
24 up soon?"

25 "Yeah, it's coming up soon. I don't know when.
26 It's -- I don't have an agenda that it's on yet,"
27 but it's -- so, no agenda doesn't bother you.

28 "Well, I hope they're not making -- are they

1 arguing -- you know, are they making an argument based
2 on Y?"

3 "I don't know, I don't think so. I don't --
4 you know, I don't remember. I don't think so."

5 "Well, I hope they're not because" and gives me
6 the reason why an argument -- why.

7 Now, under this -- these scenarios -- well,
8 particularly FTB because no agenda yet, I would have
9 to do the, "I'm not listening." "I can't tell you."
10 "Call Board Proceedings to see if it's on the agenda."
11 "And I can't tell you anything about the case," and "I
12 can't" -- "don't tell me anything about the case. I
13 can't hear anything about the case, what you think."

14 Or anything. And from a relationship
15 standpoint, or just in real life, how these things
16 happen now, this -- this regulation as proposed in these
17 alternatives would apply to all persons.

18 That means, you know, when some Board Member
19 is up at -- I don't know, pick something, State of the
20 State, they're all there. And, you know, some other
21 Legislators -- person sees them, you know, one of their
22 peers, who says, "Hey, I hear there's blah-di-blah
23 happening at the Board." You know, some case that maybe
24 people know about because there are very few that, you
25 know, rise to that level, but there are some that people
26 sort of know are out there.

27 They might have -- the Legislator may in fact
28 have been contacted by the constituent. I -- we got a

1 letter the other day from a Legislator who was contacted
2 by a constituent. That's what they're there for, so
3 they dutifully send off letters to the Board saying,
4 "Oh, you know, here's this nice constituent, can you
5 look into their problem?"

6 MR. MICHAELS: Well --

7 MS. MANDEL: I mean, those are all sort of
8 contacts that may be things that are awaiting hearing
9 and I don't know how they fit into these --

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1 MR. MICHAELS: Another example that occurs to
2 me, Marcy Jo, and, you know, Tom, I think you did this
3 and Neil's on the line there, he does it and you
4 probably do it too, you are looking for State assesses
5 and an appraisal data report or at a write-up or who
6 knows what and you call somebody in the valuation group
7 and they are a party and you go, "What's the deal with
8 this? Or could you clarify this for me? Come up with a
9 spreadsheet for me? Or could you do this or could you
10 do that?"

11 Neil, you're on the line there, right?

12 MR. SHAH: Yeah, it happens.

13 MR. MICHAELS: Are those -- this is Peter
14 Michaels speaking, Neil.

15 That's not uncommon, is it, that being the
16 case, Tom, where you call staff here and then hear
17 secondhand, "Well, we just got a call from a Board
18 Member or Board's office and blah, blah, and I wondered,
19 "What'd they say? What didn't they say?"

20 You know, but I mean --

21 MR. SHAH: It happens, Peter, sometimes -- this
22 is Neil -- we have to explain to it our Member as to how
23 you the valuation was calculated.

24 MR. MICHAELS: Yeah.

25 MR. SHAH: That's why we get the spreadsheet
26 from the staff.

27 MR. MICHAELS: Yeah, sometimes, you know, you
28 will ask or your peers will ask for something to be

1 clarified or fleshed out or for some new work product to
2 be created to make it easier for your Board Member to
3 make a decision.

4 That's not at all uncommon. In fact, it
5 probably happens almost every time we have a State
6 assessee case.

7 MS. MANDEL: In business taxes cases if there's
8 questions of appeals, what they have done on their
9 decision and recommendation.

10 MR. MICHAELS: Yeah.

11 MS. MANDEL: We want to make sure we understand
12 what's being recommended.

13 MR. MICHAELS: So, in theory, every time a
14 Board Member or staff member calls the Valuation
15 Division, in my example, a buzzer goes on?

16 MS. MANDEL: Yeah, anyway, those are kind of
17 some of the real life things -- leaving aside, you know,
18 situations where just, you know, our Members are out in
19 public and someone -- you know, they're down in the
20 Silicon Valley and people know about something that is
21 going on and someone just happens, "So, what are your
22 concerns?" Typical question when you are out in the --
23 meeting people, "What are your concerns?"

24 MR. DAVIS: Ken Davis.

25 Let me try and answer. There is a -- there is
26 probably at least two scenarios in there that I can at
27 least talk about.

28 One is the chance meeting scenario. And the

1 chance meeting, at least when Brad and I were working
2 through various scenarios, we recognized that is going
3 to happen, it's going to happen before, it could happen
4 at a conference, it could happen at any time.

5 And in that type of instance, it would -- it
6 wouldn't require the Board Member stop and go call the
7 FTB and invite it -- invite that person, it just
8 doesn't -- we want to -- the goal was to work it in a
9 practical manner. And that is that that would be just a
10 recorded -- recorded on the log and disclosed to the --
11 to the parties and the other Board members that there
12 was this chance meeting at conference where the issue
13 came up.

14 And the other type of scenario is what happens
15 if a legislator or someone else calls. The ex parte
16 communication, at least, was designed -- provisions were
17 designed to relate to communications between a party and
18 a Board Member. And some of the -- some of the APA
19 regulations really go much, much farther and talk about
20 if there's an interested party. They define "interested
21 parties."

22 We -- this regulation doesn't go that far.
23 This says if there's a communication between a party and
24 a Board Member, then the other party should be invited.

25 MS. MANDEL: That's the -- I'm sorry -- I'm
26 sorry.

27 That's so party --

28 MR. MICHAELS: What are you looking at, Marcy?

1 MS. MANDEL: I'm looking at the FTB page 26.
2 So, for the advanced notice and opportunity to
3 participate is only party -- is only FTB --
4 MR. DAVIS: Party to the appeal.
5 MS. MANDEL: -- party to the appeal?
6 MR. DAVIS: Yes.
7 MS. MANDEL: Okay. And so then on the time --
8 my example, when someone calls me up and says, "Do you
9 have 2 minutes," and it's, you know, Peter, on his case,
10 that's the call that you would say I have to say, "No,"
11 I must either -- since I can't figure out how to use the
12 conference function on my phone -- I must set up a time
13 so that I can invite FTB, right?
14 MR. LANGSTON: Only if it's awaiting an oral
15 hearing. I mean, you're only talking about a limited --
16 right, isn't that correct?
17 MR. MICHAELS: Really?
18 MR. DAVIS: Yes.
19 MR. HELLER: Only once they're are pending.
20 MR. LANGSTON: Yeah, only once the hearing's
21 pending.
22 I mean, this is --
23 MS. MANDEL: Is that also an agenda?
24 MR. MICHAELS: Once a hearing had been
25 scheduled?
26 MR. DAVIS: No, no.
27 MR. MICHAELS: Once a hearing notice has
28 been -- what do you mean "hearing pending"?

1 MS. MANDEL: He's not going -- he's not going
2 to call me unless he's calling me in my capacity as
3 representing on FTB when something -- he's only going to
4 call me on it -- just because you are sitting there,
5 Peter, he's only going to call me on an income tax case
6 where he's representing the taxpayer once -- at some
7 point after he's filed an appeal with BOE, if he's
8 calling me in my BOE capacity

9 MR. DAVIS: Ken Davis.

10 In that instance that would -- that would
11 say -- would require you to say, "Peter, let's see if we
12 get FTB on the phone".

13 MR. MICHAELS: But "pending," if I
14 understand means -- well, I don't understand.

15 What does "pending" mean?

16 MS. MANDEL: There's a difference.

17 MR. DAVIS: Brad can speak to that. There's a
18 definition that -- it was included in the regulation.

19 MR. HELLER: Real quickly -- Bradley Heller in
20 subdivision -- was it (B)(6), it's on page 27,
21 subdivision (B)(6)(C), it defines pending, it's from the
22 date the Board receives an appeal.

23 MR. MICHAELS: Receives an appeal.

24 MR. HELLER: So, it basically starts from the
25 date that we receive it, because otherwise the Board
26 would have no notice that it has -- you know, has a
27 matter before the Board.

28 MR. MICHAELS: I'm not sure your carve-out

1 there carves anything out, because until you've filed an
2 appeal, there is really not a legal incident, I suppose,
3 well, legal event.

4 And the second you do, you can't talk with
5 anybody any more.

6 MR. HELLER: I think you're right.

7 I am not saying I disagree.

8 MR. LANGSTON: The point I would make, though,
9 is there are lots of situations where people call and
10 ask general legal questions. They -- they may not --
11 they may or may not have a particular case, but the goal
12 of this was so that you wouldn't talk about the facts of
13 your case because there is a process to go through to do
14 that.

15 You file your briefs. You file answers. You
16 have an oral hearing. The idea was once you're in that
17 process, you follow that process. You don't go outside.
18 You don't -- you don't, you know, call the Board Members
19 directly. That -- that's sort of oversimplifying a
20 little bit, but that's the point of these whole rules is
21 if you are going to have any integrity and respect for
22 the process, you follow it. You don't -- you don't go
23 around it.

24 Again, very commonly, we'll talk to Board
25 Members as at conferences or meetings and discuss
26 general areas of the law. This was never intended to --
27 to stop that. I mean, maybe in -- if we get very
28 specific and a Board Member says, "Oh, gee I've got a

1 case pending on that particular issue, you know, I don't
2 want to be influenced."

3 But -- but I think you're right, there is --
4 like everything else, there are going to be gray areas,
5 you know.

6 MR. MICHAELS: With my example, a State
7 assessee petition, I mean, nothing -- nothing is
8 actually joined --

9 MS. MANDEL: Again, that --

10 MR. MICHAELS: -- or engaged until the date the
11 appeal is filed.

12 MS. MANDEL: The FTB -- what are we calling
13 this Alternative 2?

14 MR. MICHAELS: Alternative 2.

15 MS. MANDEL: My understanding is it only
16 applies to FTB cases.

17 MR. LANGSTON: Correct.

18 MS. MANDEL: The Alternative 3 applies to
19 whatever kind of case, but has agenda notice as the
20 trigger, right?

21 MR. MICHAELS: And what happens if -- if
22 some -- let's just say you've got some big oil company
23 that has got a franchise case and someone who is the
24 president of the trade association -- a trade
25 association, not a party, but a somebody -- you have a
26 Shell case and someone from the Western States Petroleum
27 Association wants to bend the ear of a Board Member or a
28 staffer, is that offensive here or not?

1 MR. LANGSTON: See, that's -- I don't know the
2 answer to that.

3 I would say probably not. If, for example,
4 they said, "We think you shouldn't have a double
5 weighted sales factor for extractive commodities,
6 because, in general, it will hurt the oil industry".

7 MR. MICHAELS: What about the specific case,
8 "You know you got that Shell case coming up, and you
9 really need to take a close look at that."?

10 MS. MANDEL: Let's take an example of a case
11 that was recently heard where somebody came -- where a
12 group of companies came in as amici.

13 MR. MICHAELS: Yes.

14 MS. MANDEL: Let's say they didn't come in
15 formally as amici, but -- so, it's on an FTB case and
16 let's call them a trade association instead of a group
17 of companies.

18 And now they are making --

19 MR. MICHAELS: They want to bend somebody's
20 ear. Can they or not?

21 And can they bend the same ear that the party
22 itself not can bend?

23 You know, are you going to just be creating
24 substitute advocates, in a way, you know?

25 If I -- I'm not saying I would do this, but if
26 I knew that I couldn't talk to somebody, but if I knew
27 that the president of the association that my client
28 belongs to could, well, temptation is there.

1 MR. DAVIS: Ken Davis.

2 I think the -- I can't speak for the Chief
3 Counsel, but I think that the intent by -- by Mr. Davies
4 was to first post up a regulation as to how this would
5 be operational with the parties.

6 And there -- if this was affected, then if
7 there were other circumstances that needed to be
8 addressed, such as the interested parties issue, the
9 sidebar with the amicus --

10 MR. MICHAELS: Amicus?

11 MR. DAVIS: -- or trade association, whoever
12 else, then the regulation would have to be amended to
13 address that -- unless at this time the staff wanted to
14 consider putting that issue into the regulation, that is
15 a requirement that interested -- that if there was
16 interested parties involved in a meeting with the Board
17 Member, then FTB should be contacted as well.

18 MR. MICHAELS: The real parties --

19 MR. DAVIS: Let me speak to one other
20 circumstance and that was -- just going back so we
21 just - don't lose it, that is, that if a party was --
22 saw a Board Member and said, "Oh, there's a hearing
23 coming up."

24 Okay, what Brad and I -- and Brad went through
25 this, the regulation talks about communications that are
26 not included. And if a party had a chance meeting with
27 the Board Member and just said, "Oh, there's a hearing
28 coming up," there's a carve-out for communication that

1 relates to a procedural matter that doesn't pertain to
2 the the issue at appeal.

3 MS. MANDEL: Oh, that's the same we have for
4 the Kopp Act.

5 MR. DAVIS: So that it's not meant to record
6 every small issue, it's that any substantive issue that
7 relates to the appeal.

8 MS. RUWART: Steve?

9 MR. KAMP: Marcy made a comment and I wanted to
10 make in comparing Alternatives 2 and 3 about the
11 different notice periods.

12 But would the FTB staff be amenable if we used
13 the pendency Kopp Act ten day notice period, which is
14 what Alternative 3 does by the way, instead of pendency
15 of an appeal because pendency of appeal, it takes --
16 that's a huge amount of time

17 MR. LANGSTON: I'm not sure what you are
18 saying.

19 MR. KAMP: What I saying is instead of using
20 your triggering point as the pendency of an appeal, use
21 triggering point as the public agenda notice date.

22 That's what we use for the Kopp Act and the BOE
23 and for at least ten years we used that.

24 That's what Alternative 3 would do.

25 MR. LANGSTON: So, only if goes to an oral
26 hearing -- up until -- through all the briefing and
27 everything, none of this would apply?

28 MR. KAMP: That's right. But that's the way it

1 is -- that's the way the Kopp Act is now on everything
2 else.

3 MR. LANGSTON: Well, we can certainly take that
4 back as a suggestion. I mean, it would severely limit
5 the -- I mean it would -- you know, it would change the
6 nature of the regulation.

7 MS. RUWART: Charles?

8 MR. DALY: Charles Daly, BOE Legal staff.

9 Is it contemplated that either or both of the
10 parties can communicate with the Appeals Section staff
11 other than in the context of prehearing conference?

12 In other words, somebody wants to talk to me a
13 week before the hearing?

14 MS. MANDEL: You mean your -- which hearing?

15 MR. MICHAELS: The Board hearing or an Appeals
16 conference?

17 MR. DALY: Board hearing.

18 In other words, somebody calls and wants to
19 talk about the case -- this never happens, this
20 previously has not happened, but it could happen.

21 MR. MICHAELS: Sure.

22 MR. LANGSTON: This reg specifically talks
23 about Board Members.

24 I mean, that's what we're talking about.

25 MS. MANDEL: But if -- if he was the Appeals
26 conference holder -- well, on a business tax case it
27 certainly can happen, which would affect the
28 Alternative 3, but on an income tax -- if he wrote

1 the -- if there wasn't any kind of hearing, but a
2 conference, but if he wrote the -- what do you call it?

3 MR. MICHAELS: D & R?

4 MS. MANDEL: But if he wrote the hearing
5 summary, you know, sometimes those -- not necessarily
6 yours, Charles, but you asked the question -- sometimes,
7 you know, they're not the most -- the greatest.

8 Sometimes we read those and have questions
9 about them. And we might, as Board Member -- again this
10 applies to Board Members, so not Board member staff -- I
11 guess that means if I have a question, I don't make the
12 call myself, but it would be possible that in some
13 offices that -- let's say I didn't have anybody working
14 for me any more, then I might have a question of why the
15 appeals officer did a certain thing or wrote it a
16 certain way and that would appear to be precluded.

17 Right? Is that your --

18 MR. DALY: Well, I guess my question is
19 basically that the regulation appears to contemplate
20 parties going before Board Member staff, arguing their
21 case.

22 Does somebody think it's beneficial to do that?
23 Is the same thing going to happen to appeals staff --
24 out of the context of a prehearing conference?

25 It sounds as though the way this is written
26 that -- that they're basically equivalent. That you can
27 talk -- if a party wants to talk about his case, argue
28 his case, a week before the hearing or during lunch at

1 the hearing or whatever, that's appropriate.

2 And if it is appropriate, certain things have
3 to happen. You have to get everybody together and is
4 this really intended to deal with communication with
5 Board Member staff?

6 The other -- the Appeals Section people are
7 carved out or --

8 MR. HELLER: This is Bradley Heller.

9 I think what Charles is referring is not
10 actually referring to Alternatives 2 or 3 specifically,
11 he's actually referring to the language that's included
12 in all three alternatives.

13 MR. DALY: Yes.

14 MR. HELLER: And in the Alternatives 2 and 3
15 it's contained in subdivision A, which is similar to the
16 language in staff's proposal.

17 And what he's referring to is this language in
18 the second sentence that refers to allowing the persons
19 to contact a Board Member's and Board staff at any time.

20 And so, what Charles is actually -- was saying
21 is he's concerned with whether or not we intended to
22 allow people to contact any person in the entire Board
23 of Equalization staff when we wrote that or something
24 else.

25 And he's specifically concerned with the
26 Appeals Division staff. And in there "staff," I
27 think -- as the person who wrote it at that time --
28 really was trying to be broad, but did, as has come to

1 my attention, that there may be reasons why we don't
2 want everyone contacting every person on the Board of
3 Equalization staff.

4 So, in order to address that issue, we're
5 considering making that "Board Member staff" so it's --
6 so that it carries through the original intent of the
7 the regulation, which was to provide for communications
8 with Board Members.

9 But basically to address communications with
10 specific just Board staff throughout the agency is kind
11 of probably more on an internal procedural basis than
12 through publications and things since there are certain
13 people who wouldn't be appropriate to contact, such as
14 like our Criminal Investigation Division, which would be
15 covered by this.

16 You know, we don't want you to just call the
17 person who runs our parking garage and start explaining
18 the appeal to them.

19 So, I think Charles has a very legitimate
20 concern concern and, assuming we don't get a lot of
21 objections to it, I think that we'll probably be
22 changing that second reference to the Board staff to
23 "Board Member staff" so it's clearly to contact the
24 Board Member and his or her staff as opposed to calling
25 anyone that you can find a phone number for on in any
26 white pages or any yellow pages, so to speak.

27 Does that clearly address that?

28 MR. DALY: Yes.

1 MR. HELLER: Thank you, Charles.

2 MR. HUDSON: Tom Hudson, I'm curious if we're
3 intentionally applying all this to homeowners and
4 renters property tax assistance appeals?

5 The reason I ask is because I tend to get those
6 calls in my office. And, you know, invariably you're
7 talking to an old person in poor health and the more --
8 the more of an act of Congress you make out of this, the
9 less helpful you are really being to the public.

10 I mean it's \$170 appeal and we're going to
11 spend \$10,000 in staff time and I wonder if that would
12 be the intent of the Franchise Tax Board?

13 MR. LANGSTON: No, I think Board staff can, but
14 the Board Members themselves -- I mean there isn't,
15 right now, a small case exception to this.

16 And that would have to be separately --

17 MS. MANDEL: You can have --

18 MR. LANGSTON: -- provided for.

19 MS. MANDEL: You could have a call?

20 MR. LANGSTON: Board staff can certainly talk
21 to them.

22 MS. MANDEL: Just don't let Mr. Leonard pick up
23 that phone.

24 MR. HUDSON: Yes, that's a good explanation.

25 MR. MICHAELS: Wait, is that true?

26 Then he gives Mr. Leonard advice based on that
27 conversation and it's all invisible?

28 MR. KAMP: Under Alternative 3 it does apply to

1 Board Member staff.

2 MS. MANDEL: Oh, no.

3 MR. HELLER: Under Alternative --

4 MS. MANDEL: No, Alternative 2, yeah, you're
5 right.

6 MS. RUWART: Brad, would you just explain?

7 MR. HELLER: Bradley Heller again.

8 And under Alternative 2, if you look at
9 subdivision B, it's on page 26, it does say, "May only
10 communicate with Board Members and their staffs," there
11 again it's referring to Board Member staffs, "during the
12 pendency of an appeal."

13 So, it does cover a conversation with the Board
14 Member staff.

15 Whereas SEIU's proposal does not cover -- the
16 only communication, if you look here, this is on
17 page 28, subdivision (b)(2)(A), it describes
18 communications that are covered and it has to be
19 directly between a Board Member and employee of the
20 Franchise Tax Board.

21 Employee of the Board that's not assigned as
22 Member staff or a taxpayer.

23 MR. MICHAELS: Well, there are Board Members
24 who don't talk with the public.

25 MR. LANGSTON: At least not while the case is
26 pending, no.

27 MR. MICHAELS: At all, period.

28 MS. MANDEL: But Tom raises a good point about

1 the --

2 MR. MICHAELS: So, you're doing all of your
3 business through his staff.

4 MS. MANDEL: -- H. R. A. cases are really the
5 sad sack. I mean you are talking people who are or
6 think they should have gotten their H. R. A. are old,
7 poor, disabled people. And sometimes the reason they
8 have a problem with FTB is because they didn't
9 understand what was required of them. They didn't get
10 the right piece of paper, though they thought they got
11 the right piece of paper. And sometimes you handle all
12 those constituent things and sometimes things can get
13 resolved if someone just takes the time to talk to them
14 and listen to them.

15 I don't know that those are the kind of calls
16 that when they just come in the office you want them to
17 hold on.

18 MR. LANGSTON: I don't think we would have an
19 objection for carving out that kind of exception to this
20 rule.

21 MR. KAMP: Steve Kamp for Board Member Yee's
22 office.

23 I would respectfully suggest that the SEIU do
24 the same thing for Alternative 3.

25 MS. ZIMMERMAN: It should go on the record that
26 I was nodding for record.

27 We agree with the small case exception.

28 MR. KAMP: Steve Kamp again.

1 For the small case exception, I think clearly
2 that would cover H. R. A. appeals, but a small case
3 exception would go beyond that.

4 MR. LANGSTON: H. R. A. appeals definitely.

5 MR. KAMP: Yeah, H. R. A. appeals definitely.
6 I don't know exactly what a small case would be defined
7 as.

8 I think you are certain to would solve the
9 problem by carving out appeals on the Homeowners and
10 Renters Assistance.

11 MR. LANGSTON: Yes, I would -- I have no
12 problem with that.

13 MR. LO FASO: For the record -- Alan LoFaso.

14 Alternative 2 context would -- we have a small
15 case definition in Part 4, I don't know what a small
16 case is as a business tax case.

17 I am sure somebody could give it some thought
18 on this.

19 MR. HELLER: Sure. As of right now, we've
20 never tried to create a small case procedure for
21 business taxes. So there has never been a need for that
22 particular definition, but -- but it's something we can
23 look into.

24 MR. MICHAELS: I am not sure you can do it.

25 I mean, this has been discussed many times over
26 the years.

27 MR. HELLER: Well, I think even regardless of
28 creating a procedure for them, we could certainly create

1 a definition applicable across programs that would
2 useful for this type of regulation to identify ones that
3 were exempt.

4 So, we could create a definition of, say, a
5 dollar threshold or something.

6 MS. MANDEL: Well, what we discovered many
7 years ago -- when they with trying to put dollar
8 thresholds on property tax cases in LA County to limit
9 time for hearing based on how much money was at stake,
10 which, you know, was not a relevant connection --
11 because you could have a small dollar case that involves
12 a very significant legal issue; you could have a huge
13 case, you know, some poor little, tiny convenience store
14 gets a one day observation test that gets projected over
15 three years and, all of a sudden, they owe a million
16 dollars. Is that a small case because it's a tiny
17 little business person with a tiny, little, you know,
18 700 foot store or is it a large case because, all of a
19 sudden, this audit process resulted in them owing, you
20 know, more than anybody in the room has.

21 MR. MICHAELS: Or is tied to what the Board has
22 to hear?

23 Because the impediment in the past,
24 historically, was, you know, we can't be distinguishing
25 between --

26 MS. MANDEL: Right.

27 MR. MICHAELS: -- big and small cases because
28 they're all eligible -- they're all entitled to their

1 day in the front of this Board, regardless.

2 MS. MANDEL: And you'll remember that there was
3 a discussion among the Board Members themselves some
4 time ago when there was a concern about how thing were
5 being calendared and there was a proposal about putting
6 large cases first or small cases firs -- I can't
7 remember.

8 And there was quite a discussion about, you
9 know, everybody's equal.

10 So -- but in terms of this aspect on the
11 communications, whether you would be able to figure out
12 something that made sense beyond H. R. A. is certainly
13 something to think about.

14 MS. RUWART: Steve, did you have a comment?

15 MR. KAMP: No, I was just -- Steve Kamp.

16 No, I was just going to say the same thing
17 Marcy just said, there was a proposal. There was a lot
18 of intense discussion when there was a proposal to
19 calendar cases by dollar amount.

20 And that was -- the Board did not approve that
21 and some Board Members were very, very concerned about
22 the appearance that would create,.

23 MS. ZIMMERMAN: Just a -- I would like to
24 participate in a follow-up issue and clarification
25 question.

26 I think that there are two definitions we're
27 talking about, one money in the case and the other is if
28 it's like a business tax, sales tax issue, the size of

1 the business -- whether it's the amount of sales they
2 have or revenue generated and that gets you to a totally
3 different issue where you're distinguishing the size and
4 capacity of a particular taxpayer as opposed to, you
5 know, the measure of the case.

6 MS. MANDEL: Yeah, but --

7 MS. ZIMMERMAN: I mean if there's a case put on
8 the record for \$170, if the Board had decided it another
9 way, it could have been a thousand dollars.

10 MS. MANDEL: Right. And the -- the question
11 for the communications issue, whether it's appropriate
12 to have -- let's just call it a small business exception
13 to the rules, which sort of came on the heels of, hey,
14 H. R. A. calls up, doesn't make sense to not deal with
15 that call. That would be the context in which you'd --
16 if somebody were to consider a "small business" --
17 putting little quotes around small business --
18 exception, you know, the guy who -- in my example, the
19 guy who owns that little convenience store, if he
20 manages to find my phone number and call me to, whoo-oo,
21 carry on -- I don't know how you spell that -- is that
22 is that something that ought to be exempted out the way
23 we talked about H. R. A.

24 I don't know, but I was just pointing out sort
25 of the different types of parameters that could come
26 into play if somebody were trying to form an exception.

27 MS. ZIMMERMAN: I am wondering for the next
28 step in the process, are there any sort of major flags

1 that go up in terms of considering a small business
2 exception in the process?

3 Will folks say immediately, "Absolutely not,
4 I'll never agree to that it should be all or nothing
5 right away."?

6 That's a question.

7 MR. LANGSTON: Well, remember what we're
8 talking about here, we're talking about we have an
9 established process to handle these various appeals and
10 things.

11 You're talking about when do you not have to
12 follow that process, so --

13 MS. MANDEL: FTB would say okay on H. R. A.
14 because that -- of the whole type of program.

15 For FTB cases he's saying they don't really see
16 the difference based on the size of the taxpayer.

17 For the -- all of the other kinds of cases is
18 where the Board is administrator of the tax, so, all of
19 the Board Members -- I am making this up just to help
20 you think about it -- not making it up, but I am just
21 saying it, it's not necessarily the position of me or my
22 office, but -- you know me, I'm the professor, right?

23 So, for all of the other types of taxes where
24 the Board is the administrator the tax, take the sales
25 tax, the Board Members have certain powers -- all within
26 their District -- to do different types of things that,
27 you know, FTB Board Members, you know, don't have.

28 It's a very different relationship to the

1 taxpayer as a Member of the Board of Equalization.

2 So, when that call from the small business guy
3 with the mini-mart comes in to me or Tom or, you know,
4 whoever, in a Board Member office, they're -- yes, they
5 have a petition pending, which is a technical way that
6 they appeal, if you will, their audit.

7 But they're still going through the process
8 with the person who is administering the tax. It is the
9 Board of Equalization that administers the tax. And so,
10 to that extent, you know, Board Members certainly, at
11 the very least, with respect to businesses within their
12 districts, where they have certain powers, they -- you
13 know, they may feel that that's a very different -- that
14 that may be a very different situation than the type of
15 situation FTB's talking about.

16 MS. CROCETTE: Marcy, this is Sabina with Betty
17 Yee's office.

18 How would you define that given -- it seems a
19 little troubling -- I am not saying it can't be done,
20 but given a lot of the quote, unquote, "small
21 businesses" when they come before the Board, they find
22 find out they owe \$5 million because, you know, they've
23 got the side business, and they -- you know.

24 So, I hear what you're saying and I just don't
25 know how we would define that.

26 MS. MANDEL: Right and it's -- somebody put us
27 on hold again.

28 You know, I don't know. That gets into that

1 whole discussion that the Board Members had. And I
2 don't know that the Board Members, even on the thing
3 that I was just saying, if that's how Board Members
4 perceive their role or their rights under, you know,
5 what the law assigns them to do that they would even
6 think that for other types of taxes there's a difference
7 at all between a small business in the sense of mom and
8 pop or gross receipts or, as Sabina points out, you
9 know, they could look like, you know, a mom and pop, may
10 just mean that you didn't -- you are not a corporation
11 or does mom and pop small business mean you're a
12 corporation with gross receipts under a certain amount?

13 But, as Sabina points out, part of what happens
14 in the sales tax audit is auditors do whatever and my
15 example where they owe a million dollars off a one day
16 observation test, that's a tax.

17 So, their actual gross receipts for that three
18 year period was something much more humongous. And so
19 it is -- it's a difficult definitional question if
20 that's where -- you know, if that's -- if that was
21 something someone was going to define.

22 MS. RUWART: May I just interject?

23 This conversation, I think, obviously should be
24 continued, but our court reporters need to take a break.

25 We're probably about twenty minutes beyond
26 their -- or more beyond their break point.

27 So, perhaps we should take a fifteen minute
28 break. Come back at 20 after and resume from there.

1 And continue this conversation and topic.
2 Thank you.
3 (Whereupon there was a brief recess.)
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1 MS. RUWART: We will reconvene the meeting.
2 Okay, is there any -- hello. We're going to reconvene.
3 How long should we go?
4 MR. HELLER: I don't know. Definitely not more
5 than an hour since we need lunch.
6 MS. RUWART: Right. So -- okay.
7 MS. HELLER: If that's a --
8 MS. RUWART: If -- if there's not a logical
9 breaking point before 12:30 we'll go to 12:30 and then
10 pick up.
11 Is there anybody new on the phone?
12 No. Great.
13 MR. MICHAELS: Is there anybody on the phone at
14 all?
15 MR. SHAH: Oh, Neil Shah. Sorry.
16 MS. MANDEL: Neil is -- he's --
17 MS. CROCETTE: Board Member Yee's office is
18 still on the phone.
19 MS. RUWART: Okay. Great. Let's -- yes, we
20 were still talking about our three alternatives. Very
21 productive discussion.
22 Steve, you were picking up where we left off.
23 Do you remember?
24 MR. KAMP: No, it's -- do I -- Oh, here's what
25 I was going to suggest is this, in terms of an exception
26 we've already carved out H.R.A. cases. I was going to
27 note that our existing hearing rules make a difference
28 between -- make a -- draw a line between people who are

1 represented and people who aren't.

2 And maybe if we drew a -- an excepted --
3 exempted basically pro pers from this situation -- from
4 these -- from these requirements. I would note the
5 corporations, that corporations not be represented by
6 natural persons, only a natural person could represent
7 themselves.

8 However, there are a lot of major taxpayers who
9 are natural persons. Whether they would represent
10 themselves, I don't know.

11 So, it's just another possibility, you know.

12 MS. RUWART: That's a good suggestion.

13 MR. KAMP: Yeah.

14 MS. RUWART: It's a good thought.

15 MR. HUDSON: I would like to just add to that
16 that, you know, I guess in the Legislature they always
17 talk about don't -- amend a bad bill, but to the extent
18 we want to make any changes in the proposal, I would --
19 I would suggest that the advantage of -- the advantage
20 of a rule like that where you've carved out people who
21 are unrepresented is that they're probably the people
22 who are very most likely not to have a copy of these
23 rules, not to understand the process, and so it's a
24 major workload issue trying to just explain to an
25 unrepresented taxpayer why you have to schedule the
26 meeting this way, why you have to invite the Franchise
27 Tax Board.

28 So, I think that's -- that's -- that's a great

1 suggestion for making this much more workable in
2 practice because, you know, the people who have an
3 attorney representing them are much more likely to
4 understand before they talk to you what the rules are.

5 MS. RUWART: Very good. Any other comments on
6 any of the alternatives? How they might apply?
7 Questions for the proponents?

8 Very good. Thank you. Brad.

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1 SECTION 5000.5033

2 PUBLIC RECORDS

3 MR. HELLER: Okay, with that we're going to
4 move ahead to the disclosure provisions. And they're
5 in -- start with Section 5-- 5000.5033, and the page
6 number I'm giving you right now is on page 45.

7 And there were -- I'd say the first alternative
8 is on page 45. And that originally represented the
9 Board's current policies with regard to disclosure of
10 information relevant to a Board hearing. There have
11 been some minor modifications to it that really don't
12 change the substance of it, but do make the language in
13 a procedural aspect conform with the language that was
14 presented in 5000.5033, the second alternative. And
15 that was more in just being more concise and just
16 generally taking some of the ambiguity out of the
17 Board's previous -- previous regulatory language on this
18 disclosure issue.

19 But, essentially, it really didn't change
20 anything substantively. So, under the first
21 alternative, this is on page 45, the Board will
22 essentially -- essentially just continue to disclose
23 the conver -- the transcript of an oral hearing, the
24 minutes of an oral hearing, and records that are
25 enter -- or documents that are entered into the record
26 of the oral hearing.

27 All those will become disclosable public
28 records. Other -- no other information is addressed

1 in -- in that policy or in Regulation 5033, the first
2 alternative.

3 Moving to the second alternative is -- is
4 multiple sections, and this is because it -- it calls
5 for expanded disclosure. And so, under that it
6 basically sets out 5033, first or -- 5000.5033 for the
7 second alternative, which essentially now almost mirrors
8 the first -- the first alternatives on which -- and just
9 deals with more specificity with the same -- same
10 documents and same transcripts and minutes.

11 Then it moves to another provision, Section
12 5000.5033.1, which is -- there's only one .1 for the
13 second alternative. And then this one discusses the
14 waivers that are inherent in proceeding to an oral
15 hearing before the Board.

16 And then it addresses the fact that by filing
17 an appeal with the Board, the taxpayers -- or filing an
18 appeal from the Franchise Tax Board with the Board
19 constitutes a waiver of the taxpayer's confidentiality
20 with regard to information that both the Franchise Tax
21 Board and the -- and the taxpayer are sharing with the
22 Board.

23 It also points out that -- that requesting an
24 oral hearing in a -- in a business taxes matter also
25 constitutes a waiver. And the same with property tax
26 matters.

27 And then it goes through and describes what
28 those waivers apply to for those two different programs.

1 For business taxes purposes it's very limited. It's
2 still basically just -- it's just information that's
3 disclosed on the actual transcript of the oral hearing
4 or information included in -- in the hearing summary
5 prepared for the hearing.

6 For property tax matters it's -- it's a more
7 extensive list. There's the petition or application and
8 any supporting documents. The briefs that were filed.
9 The hearing summary that could be prepared. And any
10 other information provided to or obtained by the Board
11 that's actually disclosed on the transcript of the
12 taxpayer's oral hearing.

13 MS. MANDEL: Can I ask you a question right
14 now?

15 MR. HELLER: Certainly.

16 MS. MANDEL: Is this Alternative 2 current
17 practice and just more descriptive of current practice?
18 Or is it beyond current practice?

19 MR. HELLER: Alternative 2 is -- goes beyond
20 current practice with regard to -- especially with
21 regard to --

22 MS. RUWART: Timing.

23 MR. HELLER: Well, with regard to timing, for
24 all -- well, I should say with regard to appeals from
25 the Franchise Tax Board it actually is very descriptive
26 of current -- of our current practice --

27 MS. MANDEL: Okay.

28 MR. HELLER: -- which is that essentially we do

1 disclose all the information that we received with
2 regard to a Franchise Tax Board appeal.

3 MS. MANDEL: Okay.

4 MR. HELLER: With regard to Business Taxes and
5 Property Tax matters it's -- it's different and in
6 two different ways. One dealing with timing and one
7 dealing with the type of information that's going to be
8 disclosed.

9 And so, first off for timing purposes, and I
10 was just going to get there, the next Subdivision (d)
11 talks about the effective date of these -- of these
12 waivers.

13 So, just because someone files -- requests an
14 oral hearing doesn't necessarily mean we're going to
15 disclose all their information.

16 What this effective date says is that the
17 waivers, themselves, they become effective on the date
18 the Board issues its first public agenda notice showing
19 that the matter's been scheduled for an oral hearing.

20 So, to the extent that these matters are
21 resolved before a public hearing, in a Business Taxes or
22 Property Tax matter there wouldn't be any need for
23 disclosure there. It would only be with regard to -- to
24 matters that are -- actually end up on a public agenda
25 notice because they've been scheduled for a Board
26 hearing.

27 In those cases, though, the effective date is
28 then the issuance of the public agenda notice. So, that

1 the information that I've just described that we would
2 now disclose can be disclosed prior to the actual
3 hearing.

4 So, now a third party or anyone else who wants
5 to be able to understand what the Board's doing at the
6 particular hearing as far as -- as far as actually
7 seeing a copy of the hearing summary, for instance, and
8 knowing what issues are being presented, would be able
9 to do that at the hearing.

10 Basically, under our current procedures for
11 Business Taxes, we would only disclose for Business
12 Taxes normally just the transcript of the oral hearing
13 and the minutes of the oral hearing, and any documents
14 that were entered in the record.

15 So, you would not get the hearing summary. And
16 then those documents we would only disclose to you after
17 the hearing had concluded. So they wouldn't be of use
18 to a person trying to participate or watch the hearing.
19 But it would be useful to somebody who's just trying to
20 figure out or get a good recollection of what -- what
21 actually happened in the proceeding.

22 For Property Tax, and I think Carol can help me
23 with this but, one, it also -- what disclosure we do do
24 in Property Tax currently happens after the hearing.
25 And this shifts that again to as of the -- the date that
26 the public agenda notice is issued. And then I believe
27 it actually covers pretty much the same documents that
28 would be disclosed --

1 MS. RUWART: It is intended -- the list in
2 Subdivision (2) is intended to capture the scope of what
3 is currently disclosed at the conclusion of the oral
4 hearing.

5 MS. MANDEL: Okay. And --

6 MR. MICHAELS: At the conclusion.

7 MS. MANDEL: Currently at the conclusion under
8 this proposal.

9 MS. RUWART: What is currently -- what is
10 currently disclosable -- I suppose technically it's
11 after the hearing has begun.

12 MR. MICHAELS: Well --

13 MS. RUWART: But --

14 MR. MICHAELS: Go ahead.

15 MS. RUWART: -- they real -- realistically it's
16 after the hearing is over and somebody wants a set of
17 public --

18 MR. MICHAELS: Yeah.

19 MS. RUWART: -- records.

20 MR. MICHAELS: That's for sure.

21 MS. RUWART: That's what they get. And it's
22 intended to capture that. It's just to move up the date
23 to being ten days before.

24 MR. MICHAELS: Would --

25 MS. RUWART: So --

26 MR. MICHAELS: Would that -- this -- there's a
27 notice that I copied here that accompanies most writeups
28 before a hearing. This is a staff writeup, and it says

1 on it here, "Unless the Board objects or otherwise
2 holds, the Board will take official notice of," and then
3 it lists a whole litany of -- of documents broad --
4 broadly described that the Board will take official
5 notice of.

6 Does that then slip into the actually disclosed
7 on the transcript of the taxpayer's oral hearing?

8 MS. MANDEL: So the A.D.R. and everything.

9 MR. MICHAELS: So, the property statement, the
10 attachments, report, studies, experts, work papers, all
11 that stuff is -- is public.

12 MS. RUWART: Diane, how do you guys
13 interpret -- I mean, I know how I interpret that, but
14 how -- do you know what he's asking? When you get a
15 Public Records request, how -- how do you currently
16 respond?

17 MS. OLSON: You know, I don't know.

18 MS. RUWART: Oh, I am sorry. You're -- you're
19 the wrong person.

20 No, I -- I'm --

21 MS. OLSON: Gary -- Gary might.

22 MR. EVANS: We call Legal.

23 MS. RUWART: Yeah. No, my -- my
24 understanding is that -- is that it is not -- not the
25 property statement and all that. It's -- all we
26 disclose is the petition and everything that came
27 afterwards.

28 MR. AMBROSE: Yeah. This is Lou Ambrose.

1 Yeah, we -- every -- everything the petitioner has
2 submitted and that valuation is put into the record, you
3 know, in support of their -- their response is
4 disclosable.

5 MS. MANDEL: But that's why --

6 MS. RUWART: But it's from the petition onward.

7 MS. MANDEL: But that's why Peter asked the
8 question.

9 MS. RUWART: Right.

10 MS. MANDEL: Because with the --

11 MR. MICHAELS: Right.

12 MS. MANDEL: -- because with the hearing
13 summary or whatever we -- those different documents we
14 get now, it says at the bottom what he just read, which
15 is that --

16 MS. RUWART: The official --

17 MS. MANDEL: -- the Board will take official
18 notice of --

19 MR. AMBROSE: Right.

20 MS. MANDEL: -- these four things.

21 MR. AMBROSE: Right.

22 MR. MICHAELS: Right.

23 MR. HELLER: Right.

24 MS. MANDEL: So, are those items that are
25 actually disclosed on the transcript somehow?

26 MS. RUWART: Those go into --

27 MR. MICHAELS: Yeah.

28 MR. HELLER: Well, we would --

1 MS. MANDEL: So, that's his question.
2 MR. AMBROSE: I don't think so.
3 MS. RUWART: That's --
4 MR. AMBROSE: I don't think we -- I don't
5 think we can ever disclose the property statement
6 without a waiver.
7 MS. MANDEL: And his question is whether this
8 rule then would --
9 MR. MICHAELS: Sweep that in.
10 MS. MANDEL: -- automatically constitute a
11 waiver. That this rule sets up an automatic waiver.
12 MR. MICHAELS: Because, I mean, it does say the
13 taxpayer waives its right to confidentiality.
14 MS. RUWART: Yeah.
15 MR. MICHAELS: You can choose between --
16 MR. AMBROSE: Where -- where are you reading
17 from?
18 MR. MICHAELS: -- due process or trade secrets.
19 Choose one.
20 MS. RUWART: My -- my understanding is that's
21 not how we've interpreted it in the past. But I can see
22 the issue and so let me go back and just clarify that
23 answer.
24 MR. MICHAELS: I didn't mean that critical.
25 MS. RUWART: No, it's a first -- it's
26 definitely a legitimate issue. Let me go back and
27 clarify that.
28 My understanding is, though, is that we have

1 not disclosed the property -- anything that was
2 pre-petition. We've only disclosed things that were
3 from the petition onward.

4 MR. MICHAELS: Yeah, there -- the -- I think
5 institutionally, in the Valuation -- I don't think
6 there's anyone from Valuation here, but Lou, you'll be a
7 good voice for them.

8 They've been really, I think, respectful in the
9 past and accommodating, but that's not to say that their
10 successors would be and they generally have taken the
11 position that if -- if what you file is part of the
12 property statement that gets filed on March 1st, it's
13 off limits. But --

14 MR. AMBROSE: Right.

15 MR. MICHAELS: -- if you supplement your
16 property statement with a report that maybe you didn't
17 even have on -- on March 1st, such as the one we turned
18 in yesterday, that's not part of your property
19 statement, and then suddenly it's fair game and there
20 goes the neighborhood.

21 MR. HELLER: Absolutely.

22 MS. RUWART: I will --

23 MR. AMBROSE: What you -- so, you -- you know
24 of instances where that's actually gone to the record?

25 MR. MICHAELS: You know, it's -- it's a -- it's
26 almost an impossibility for these big regulated
27 utilities to turn all of the reports and everything in
28 by March 1st.

1 MR. AMBROSE: No, I'm not saying that.

2 MR. MICHAELS: So they get extensions and it's
3 not part of the property statement.

4 MR. AMBROSE: Right. They -- but the way I
5 read this, it's only something that's filed in support
6 of your petition on your brief. What you're saying -- I
7 mean, what I'm understanding you to say is something
8 that's supplementing or augmenting or whatever, a
9 property statement, which to me, I mean, that's
10 completely different.

11 MR. MICHAELS: But couldn't you -- I'm not
12 thinking about me so much as -- as you. Could you or
13 could your client or however this is configured, say
14 we'd like to introduce the, you know, study that was
15 turned in here in support of the property statement as
16 Exhibit A. I mean --

17 MR. AMBROSE: No, because it's yours. Not --
18 not a third party's.

19 MR. MICHAELS: But -- but it might make your
20 case. You may see something in there where you say --

21 MR. AMBROSE: Or because the petitioner had
22 previously submitted it --

23 MR. MICHAELS: Yeah.

24 MR. AMBROSE: -- during the --

25 MR. MICHAELS: Yeah. Because I --

26 MR. AMBROSE: I think that the practice -- you
27 know, the policy would be that they wouldn't. I mean,
28 just like they wouldn't disclose --

1 MR. MICHAELS: They're nice. I mean, I don't
2 know if that's really the real deal, or they're just
3 being nice about it.

4 MR. AMBROSE: I think --

5 MR. MICHAELS: You know, because --

6 MR. AMBROSE: I can't recall offhand if -- you
7 know, there's something in writing but, I mean, that's
8 always been the practice.

9 MR. MICHAELS: Yeah. Well, I mean, it's --
10 it's just sort of license for mischief but -- in -- in
11 my mind where someone could very, very liberally
12 construe this to include everything that the taxpayer
13 submitted.

14 MS. MANDEL: It's -- under --

15 MS. RUWART: Because of that official notice
16 provision.

17 MR. MICHAELS: Yeah.

18 MS. MANDEL: Yes.

19 MR. MICHAELS: It all gets swept into this
20 thing here.

21 MS. MANDEL: I have a question on the effective
22 date.

23 MR. MICHAELS: Any attachments, any work
24 papers, any studies, everything.

25 MS. RUWART: I will reconcile that, yes.

26 MS. MANDEL: I have a question on the effective
27 date.

28 MS. RUWART: Yes.

1 MS. MANDEL: So, this waiver starts with the
2 public agenda notice --

3 MR. HELLER: Uh-huh.

4 MS. MANDEL: -- which is the ten-day notice.
5 And -- but if the taxpayer -- oh, the -- may be -- the
6 waivers may be rescinded by the taxpayer at any time
7 before it becomes effective. Before -- what's the "it"?
8 Not the taxpayer becoming effective. The waiver?

9 MR. MICHAELS: The waiver.

10 MS. MANDEL: Before the waiver becomes
11 effective if you agree -- so, if a taxpayer waives its
12 right to an oral hearing after the public agenda notice,
13 that's not rescinding the waiver.

14 MS. RUWART: Correct.

15 MR. HELLER: Correct. It becomes effective,
16 anyway.

17 MS. MANDEL: But you haven't made a waiver
18 until the public agenda notice, so how do you ever
19 rescind a waiver before it becomes effective? That's my
20 question.

21 MR. HELLER: The way it's set up is -- excuse
22 me, it's Brad Heller. The way that it's set up is the
23 waiver actually occurs when they -- when they go ahead
24 and request the oral hearing or file the brief or the
25 appeal or so on back in the -- in the earlier
26 provisions.

27 So, it's -- for instance, under Subdivision (b)
28 it says, "The filing of a written request for an oral

1 hearing before the Board pursuant to Chapter 2 shall
2 constitute a waiver."

3 So, that's the waiver. The waiver is there.
4 They've given us a waiver --

5 MS. MANDEL: Oh.

6 MR. HELLER: -- by filing it.

7 Now later it says that waiver, though, while
8 having given has a future effective date. It's not in
9 effect. We wouldn't now immediately disclose your
10 information to a third party.

11 MS. MANDEL: Okay, I understand. I see what
12 you're saying now.

13 MR. HELLER: So, if you go ahead and waive your
14 right before it's effective, then we can go ahead
15 and -- and we will let you rescind the waiver that you
16 gave us and it will never become effective.

17 MS. MANDEL: Okay. So that probably answers my
18 second question, which was you're on a public agenda
19 notice and before the hearing date your hearing gets
20 postponed for some reason. The waiver is still --

21 MR. HELLER: It would still be effective.

22 MS. MANDEL: It's still -- it's not one of
23 these that goes away again and becomes re-effective with
24 a new public agenda notice?

25 MR. HELLER: Right.

26 MS. MANDEL: It's just out there.

27 MR. HELLER: Right. And that's -- yes.

28 MS. MANDEL: Okay.

1 MR. MICHAELS: Can you trans -- say that --

2 MS. MANDEL: In a better --

3 MR. MICHAELS: I didn't quite get it. So,
4 therefore -- therefore, if you get a continuance --

5 MR. HELLER: Right.

6 MR. MICHAELS: -- you're not out of luck or you
7 are out of luck?

8 MR. HELLER: You would be if you got -- if
9 the -- if you're granted a continuance after the public
10 agenda notices come out --

11 MR. MICHAELS: The first one.

12 MR. HELLER: Right, the first one --

13 MR. MICHAELS: Right. Postponed to --

14 MR. HELLER: -- then you are out of luck as far
15 as withdrawing your waiver. You cannot rescind your
16 waiver after it's become effective. And it would have
17 become effective when that first public agenda notice
18 was issued.

19 So, it doesn't allow for us to reschedule that
20 hearing and therefore allow the waiver to be
21 postponed -- postpone its effective date again.

22 MS. MANDEL: Which is different than a lot of
23 the other places where we have public agenda notices
24 that trigger.

25 MR. HELLER: It's different than -- I think the
26 main place where we have it as a trigger is in SEIU's
27 alternative proposal for the communications with Board
28 Members.

1 And in that one it does allow us to essentially
2 sort of take back --

3 MS. MANDEL: Oh, I'm thinking of another thing
4 that's not in regulatory form. I'm thinking of a legal
5 opinion.

6 MR. HELLER: Okay. At least that's been -- the
7 only other thing I think we have in this current package
8 of regulations that's similar, and that one it does
9 allow it because I think -- at least in that case we
10 were focusing on information relevant to the hearing.

11 MS. MANDEL: Right

12 MR. HELLER: Here I think it was -- I'm not
13 really sure, but it's something we could consider if
14 it's -- it becomes a point.

15 MS. RUWART: Steve.

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MR. KAMP: Steve Kamp for Board Member Yee's office.

Couldn't a lot of the taxpayers' concerns about confidentiality on things like property statements, the public disclosure only goes to what you submit for consideration by the Board, let's say, for a reassessment hearing or anything that goes beyond the audit process, couldn't that be resolved if the taxpayers just redact everything they don't need as in, say, the property statement to argue their case?

MS. MANDEL: But I think it has to do with what -- what happens on the Board staff side, not what happens --

MR. KAMP: Okay.

MS. MANDEL: Not necessarily what happens on the taxpayer's side.

MR. KAMP: Okay.

MR. MICHAELS: That's exactly right.

Once the taxpayer turns it over, does that mean it's fair game if the taxpayer files an appeal?

MR. AMBROSE: What about -- what about putting in a broad exception, like, you know, "Unless otherwise prohibited by staff," you know, "Disclosure is otherwise prohibited."?

For property statements there is a statutory prohibition for disclosure, right?

MR. MICHAELS: Well, yeah. There seems to be a

1 disregard of what is prohibited by the statute and in
2 what other context.

3 So --

4 MR. HELLER: Bradley Heller again. It's
5 problematic language about it and it tends to not convey
6 any distinct message to the reader.

7 MR. MICHAELS: Yeah.

8 MR. HELLER: You don't know if this will be
9 disclosed.

10 Now you need to be Brad Heller and go out and
11 start reading all of the different statutes that apply
12 to disclosure and reconciling all of the conflicts and
13 then you still are stuck in Peter's situation of hoping
14 that I did it in the manner that he would have done that
15 same research.

16 So, it's very helpful, I think -- assuming we
17 can come to an agreement on what is covered a statute or
18 not, and then to go ahead and explain whether that is
19 disclosable or not disclosable -- creating some catchall
20 that might just apply broadly to things.

21 MR. KAMP: There are some specific statutes
22 7056 in sales tax, 400 something for State assesses and
23 there's a a property tax assessor records, things like
24 that.

25 You could specifically cross reference those
26 and probably cover a lot of ground.

27 MR. HELLER: Well, sort of. I mean -- there
28 are some technical issues referencing those sections, I

1 think

2 MR. KAMP: Yeah.

3 MR. MICHAELS: Yeah.

4 MR. HELLER: And essentially what this proposal
5 does is it essentially establishes a waiver of
6 confidentiality.

7 And so what we need to the do is define the
8 parameters of that waiver and not learn -- not look to
9 what was confidential before there was a waiver.

10 Because that's -- it essentially gets us back
11 to our original discussion again there and not dealing
12 with what's disclosable, but instead -- or what's -- or
13 what we can disclose but essentially going back to what
14 are we prohibited from disclosure if the taxpayer hasn't
15 given us a waiver?

16 MS. RUWART: Tom?

17 MR. HUDSON: I want to be clear, the purpose
18 behind even putting this in the rule sounds like
19 particularly the alternative that's kind of what we do
20 now and I want to be sure I can communicate that to my
21 boss.

22 Why are we -- why are we specifying this
23 waiver? Is there a problem we're trying to solve with
24 this?

25 MS. MANDEL: Why is the recommendation with
26 Alternative 2, unlike the last time we talked about --
27 these were both drafted by staff -- and then the
28 beginning says that staff's recommendation is going to

1 be Alternative 2.

2 So, how does he explain that? Why?

3 MR. HELLER: Let me explain. There are a
4 couple of different things that are being accomplished
5 within this regulation.

6 But, first off, basically there's not a big
7 change in current practice or anything that really needs
8 to explained very much with regards to appeals from the
9 Franchise Tax Board. They're pretty much treated almost
10 exactly the way they are currently. There's a little
11 bit of language that deals with redaction of some
12 personal information dealing with bank accounts and
13 things. That would be the only change or really even
14 not even quite a change, but a codification of some
15 existing policies that have on Franchise Tax Board
16 appeals.

17 For business taxes matters, though, there's a
18 very big change that that's being proposed here. And
19 essentially, as Mr. Kamp was pointing out, there are
20 code sections that prevent Board staff from disclosing
21 confidential taxpayer information relevant to most of
22 the business taxes matters. And the Board does need a
23 waiver from a taxpayer to go ahead and disclose that
24 type of information.

25 So, currently, Board has historically -- or I
26 should say the legal Department has historically
27 interpreted going and requesting an oral hearing and
28 appearing at an oral hearing conducted during an open

1 open session as a public meeting does represent a waiver
2 of that taxpayer's right to confidentiality with regard
3 to what they're going to discuss and permit the Board
4 staff to oppose at that hearing in front of the public.

5 But what this is does is then say, "Well, what
6 does that waiver really apply to?" And it goes to,
7 basically for business taxes purposes, fleshes out that
8 waiver. And it actually gives some guidance on what
9 that waiver actually applies to.

10 As of right now there's -- it's an unwritten
11 waiver that I would say some litigants are aware of and
12 others aren't and even some representatives are aware of
13 and some are not.

14 So, this does provide clarity as to what the
15 waiver is and when it's applying and also as to what it
16 applies to, what kind of information would be disclosed
17 so no one would come back later on and say, "Oh, my
18 goodness, somebody got my hearing summary, I didn't know
19 they would get that."

20 Now they would know. Same with like a
21 transcript of the hearing, in fact, for instance.

22 For property tax purposes it's not a major
23 change in the amount of information that will be
24 disclosed, although other than some of the details that
25 Peter has pointed out, which I think we can still work
26 on what is exactly supposed to be disclosed, but the
27 real change there was -- was based on when the waiver
28 applies. And, basically, prior to this set of rules,

1 the waiver for a property tax matter would apply after
2 the hearing was conducted so that the same information
3 that we're listing here, or something very similar to
4 it, would be disclosed at the conclusion of a hearing.

5 This makes -- basically goes into discussing
6 the waiver and making it applicable prior to the hearing
7 so that the information would be available to the third
8 parties and people who wanted to actually see and
9 understand what the Board's doing at that actual hearing
10 in front of the public.

11 I think those are really the main two things
12 that are being done here. The two -- well, two areas
13 that are being changed and those are the changes that
14 are being made in those areas.

15 Other than that, it really goes along and does
16 a couple of other things. This kind of leads into -- it
17 codifies an idea that we're trying to protect certain
18 information from identity theft, so it also creates an
19 exception so that the Board can go ahead & Redact out
20 information like personal addresses and bank account
21 numbers and things like that.

22 And then it also it creates a new procedure for
23 the Board to consider matters in closed session. That's
24 in subdivision -- that's in also in the exceptions in
25 subdivision E, paragraph 2 on page 50. And so,
26 basically beforehand, in a prior draft of this proposal,
27 we had basically said that the -- I think the Chair, the
28 Board Chair could take whatever actions are necessary in

1 his or her discretion to protect sensitive information,
2 or something to that effect, I believe.

3 And there really was not any broad support for
4 that kind of language or work for such an undefined
5 procedure, at least at the last interested parties
6 meeting.

7 So, staff -- staff looked at quite a few
8 comments that were received, several very good ones from
9 Peter Michaels as well, that basically pointed us
10 towards the closed session procedures, which are
11 available to the Board under the Open Meeting Act.

12 And basically then, through that, it says that
13 this waiver that we have been discussing all along won't
14 apply to a matter that is going to be discussed in
15 closed session.

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1 SECTION 5000.5033.2

2 REQUEST FOR ORAL HEARING

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4 MR. HELLER: Then there is another regulation
5 coming up, Section 5000.5033.2. That then goes through
6 how that -- how somebody would request closed session
7 and the procedures for reviewing that request and then
8 that is also based on comments that we received at the
9 last interested parties meeting. We incorporated some
10 judicial standards for specific items dealing with --
11 where is that now? It's in -- hold on.

12 MR. KAMP: Page 51 and 52

13 MR. HELLER: Page 51 and 52, and it basically
14 deals with trade secrets and other confidential or
15 commercial information, which are statutorily -- well,
16 they're statutory terms which have been defined by the
17 courts with regard to the sealing of information in
18 civil proceedings.

19 And so we incorporated, basically, those same
20 definitions and made it possible for a litigant, or I
21 should a party a Board matter, to request a closed
22 session by going ahead and describing these types of
23 information and providing information that would
24 indicate that it would be relevant to discuss after a
25 particular hearing since we don't think a closed session
26 would be necessary just because a company has a trade
27 secret, but if it's going to be disclosed on the record
28 at an open meeting, that would be a concern.

1 We want both qualifications to be included in
2 the request. And then it essentially allows the Chief
3 Counsel to review the request and prepare a
4 recommendation for the Board Chair, who then can decide
5 whether or not to have a closed -- schedule the matter
6 for a closed session.

7 And this basically it's just -- I'll just
8 finish real quick and I will go through some questions.

9 But essentially what it does is then allows the
10 Board Chair to schedule a closed session. Once the
11 closed session, the Board -- the other Board Members may
12 object to the closed session. And if a motion to hold
13 the matter in an open session passes, by a majority vote
14 of the Members at that closed session, then the matter
15 will be rescheduled for an open hearing.

16 And this is a mechanism that we came up with
17 which would allow the full Board to decide on whether
18 something should be heard in closed session but, at the
19 same time, they can't do that without being an actual
20 meeting, so, they have to actually be in closed session
21 to actually discuss somebody's confidential information
22 that they don't want disclosed. This is really one of a
23 very few mechanisms that would allow this information to
24 end up in a closed session before all of the Board
25 Members, who could then decide whether they really
26 wanted a closed session to be held, or in the discussion
27 of the merits of substantive matters of the hearing.

28 So, that's completely new as well.

1 MS. MANDEL: I have a question?

2 MR. HELLER: Uh-huh

3 MS. MANDEL: Is it contemplated that -- that if
4 there were trade secrets, that the entire hearing would
5 be conducted in closed session or that only the part of
6 the hearing with respect to taking that testimony and
7 any discussion of that testimony or that that
8 documentary evidence would be sealed?

9 Because there's a difference. The one that I
10 was involved in a hearing that had trade secrets, it was
11 while that witness was testifying, we cleared the
12 Appeals Board room. And then once that witness was --
13 and that part of the transcript was sealed and any
14 documents that came in as part of -- while he was
15 testifying, were sealed. But that the rest of the
16 hearing, of course, we didn't -- it had to do with the
17 specifics of how many cars people rent at different
18 airports and things and we didn't put any of those
19 specifics in any type of briefing or anything. Of
20 course, the Assessment Appeals Board doesn't deliberate
21 in open session, so, that's another difference between
22 the Board. I know at -- when I sat on -- what Board was
23 that, Board of Control, for particularly sensitive cases
24 sometimes they actually discussed some things in closed
25 session. But -- I mean how is this contemplated?
26 Because it wouldn't --

27 MR. MICHAELS: Well, even I --

28 MS. MANDEL: It wouldn't seem that necessarily

1 the entire hearing --

2 MR. MICHAELS: No, I've never ever thought
3 that, nor meant to suggest that.

4 As far as I'm concerned, the only circumstances
5 where a hearing should be closed to the public is if
6 proprietary and confidential trade secret, business
7 affairs information is front and center, you know, and
8 there is a bright light being shown on it.

9 That's not an excuse to close the whole
10 hearing, it's just a reason to close the hearing during
11 the discussion of that specific information

12 MS. MANDEL: And it gets -- because the
13 Board -- this Board deliberates and makes its decision
14 in open session, to the extent the Board Members after,
15 let's say, they closed the part of the hearing that had
16 to do with the confidential discussion, you know, maybe
17 that's three minutes of your pitch or two minutes of
18 pitch or maybe you have a witness or something or some
19 document. Then when the Board deliberates, presumably
20 the Board would have deliberate as to that issue, and if
21 they are going to say anything out loud --

22 MR. MICHAELS: Depends what they say.

23 MS. MANDEL: -- they can go into closed session
24 and say what they have to say.

25 So, anyway, that was my -- because it didn't
26 seem like it was either clear or necessarily the whole
27 thing be closed.

28 MR. HELLER: Basically staff contemplated doing

1 the entire hearing during closed session and is
2 definitely open to these comments.

3 But, essentially, staff's big concern was that
4 it's very possible that these -- that this kind of
5 information permeates the hearing. And we also received
6 some comments at the prior meeting on Part 5 concerning
7 the ability to bind a particular Board Member to not
8 discuss something during an open session. So, that
9 created the potential for them to be an open session in
10 deliberative forum with confidential --

11 MS. MANDEL: It's always hard to control what
12 comes out of the mouth.

13 MR. HELLER: -- that there was a risk.

14 But staff certainly wasn't trying -- certainly
15 thinks the Board Members can handle that. It's just --
16 it was the basis for us thinking that the entire matter
17 should be closed.

18 We can change that to just for the discussion
19 of the confidential information.

20 MS. MANDEL: It would seem if it was -- I mean,
21 I don't know how we will ultimately decide this -- but
22 it would seem that there was, you know, two clear
23 issues, there might be a difference.

24 But then again, you know, the Board hearings
25 are so different than a local Assessment Appeals Board
26 hearing where you actually conduct the full trial. So,
27 sort of closing it for the half hour the guy is on the
28 stand in a 2 week Appeals Board hearing is a little

1 different than what they do up here.

2 I was just wondering.

3 MR. HELLER: I think it -- I mean it's
4 something we can prepare alternatives or it's definitely
5 something I think if we go forward with this proposal to
6 the Board Members we want to make clear that there are
7 alternatives, there is potential alternatives, although
8 staff probably will try to come up with a
9 recommendation.

10 We'll make sure that we -- assuming something
11 does go forward, that the Board Members are briefed that
12 there's -- there are options on whether to close the
13 entire hearing or to only close the portion with the
14 confidential information.

15 And, I think, staff really could go either way.
16 I don't think we were concerned to try to limit the
17 Board Members or the taxpayers' presentation at all, we
18 were just concerned that once, you know, the Chair
19 decided something was sensitive and confidential that we
20 not take any additional risks.

21 MS. MANDEL: Okay.

22 MR. KAMP: Steve Kamp, Board Member Yee's
23 office.

24 Noting on page 51 of the underlying -- you have
25 at the very top of the page subdivision (A)(2), "The
26 Board may not conduct oral hearings requested during a
27 closed session," and it appears in A, any State
28 assessees reassessment petition.

1 I assume that is because of a very specific
2 statutory provision?

3 MR. HELLER: That's correct.

4 MR. KAMP: If it is -- it's not 721.5, as the
5 definition, it's 733 or something like that and I think
6 you ought to cross-reference that, quote it, because
7 that's why you can't.

8 And then you say are not going to conduct any
9 closed hearings on an FTB proceeding, which is a reason
10 for that.

11 MR. HELLER: That's correct.

12 There's also the same statutory authority
13 that -- the same statutes that the Board has interpreted
14 -- the Board has interpreted the disclosure provisions
15 with regard to Franchise Tax Board appeals as requiring
16 the Board to disclose and treat as public records all of
17 the briefs and all of the documentation.

18 MR. KAMP: Right.

19 MR. HELLER: So, to close a hearing would make
20 no sense. So, that's really what was the basis was,
21 although it's not -- I think the Open Meeting Act would
22 allow us to do it in some respect, but then,
23 essentially, all of the information would be public then
24 anyway.

25 MR. KAMP: My recommendation --

26 MR. HELLER: I'm not really sure.

27 MR. KAMP: is to make some references to that
28 authority in here just so for people understand why.

1 MS. MANDEL: I only one time can remember on
2 franchise tax case being asked what the Board's position
3 is on closed hearings because it was the -- there was --
4 there was a significant view of something that they
5 would not want public, that they were convinced that if
6 they were in a court they would be able to get it
7 sealed.

8 And I know that they talked to -- you know, I
9 referred them to Boyer at the time when he was here, and
10 I believe, because of the differences -- it's an option.
11 They don't have to come to the Board. People who know
12 that will simply take their case to the court where they
13 can get it sealed. And that's their choice.

14 MR. HELLER: Correct.

15 MR. KOCH: Question, Al Koch.

16 This is on Alternative 2 and the exceptions.

17 In some matters the name of the taxpayer is
18 regarded as confidential, but not in this. I am just
19 wondering about that.

20 And the second thing is cap B, I don't quite
21 understand what can be disclosed, in the briefing, I
22 mean.

23 You wouldn't want trade secrets disclosed in
24 the briefs of the Board, I assume, but this --

25 MR. HELLER: That's correct.

26 MR. KOCH: -- this seems to exempt those.

27 MR. MICHAELS: Al, what are you -- what B are
28 you looking at? What page?

1 MR. KOCH: I'm looking at (b)(1)(b).

2 MR. MICHAELS: (b)(1)(b).

3 MS. MANDEL: What's the page, Al?

4 MR. KOCH: Page 50.

5 MR. MICHAELS: (E) -- yeah, (E)(1)(b), I see.

6 MR. KOCH: Yeah, (E)(1)(b).

7 MR. HELLER: Okay, what was (E)(1)(b) designed
8 to do?

9 Well, essentially, what we were trying to do in
10 subdivision (E)(1)(a) was describe certain information
11 that's typically used in identity theft, and basically
12 point out that the Board's going to try to not be a
13 source for information for identity theft in the future.
14 So, this was information that we were going to redact.

15 But in discussions with the Franchise Tax
16 Board, it became clear that there were situations where
17 you might need to speak about information that we
18 wouldn't knowingly disclose and we want to make it clear
19 that to the extent that it's relevant to a hearing that
20 it could be used in a manner that won't disclose this
21 information otherwise.

22 So, what -- what (E)(1)(b) says is it says that,
23 (E)(1)(a) doesn't prohibit the party to a Board hearing
24 where the Board Members or the Board staff from
25 referring to the information described in A, in briefs
26 or in the -- in briefs filed pursuant to this division
27 or in any manner that will not disclose a person's
28 actual address, telephone number, Social Security number

1 and so on.

2 So, essentially as long as you come up with a
3 proxy and a manner to refer to them, they would still be
4 able to have a discussion and be referred to --

5 MS. MANDEL: We could refer to --

6 MR. HELLER: -- you know, Retailer AA, for
7 instance, as opposed to the retailer's name or --

8 MS. MANDEL: -- or the one that we had a while
9 ago, sort of slipped through, where we got -- where we
10 had a decision document came out that actually had
11 someone's street address. We got called by someone on
12 the outside who said, "Oooh, don't." So, instead of --
13 saying -- on residency case, "Oh, well, they have their
14 house at blahdy, blahdy blah, such and such lane, Cota
15 de Caza, just say they have their house in Southern
16 California.

17 That would be a way of referring to it, if
18 necessary, without --

19 MR. HELLER: Right.

20 MR. FOSTER: And that's typically how we do it
21 already in the appeals, we'll say, you know, the house
22 in, you know, Reno versus the house in Los Angeles.

23 We don't provide any specific addresses.

24 MR. MICHAELS: I had a question about this CCP
25 definition of trade secrets.

26 Were there other definitions? Is that -- I
27 have seen definitions myself and researched this. And
28 I'm, I guess, wondering when I read it, you know, I

1 thought about applying it to some of the folks who I
2 typically represent and whose secrets I protect.

3 And, you know, the standard here, "unwarranted
4 annoyance," that kind of assumes that there is some
5 level of warranted annoyance.

6 "Embarrassment or oppression," well -- golly,
7 you know, I don't think PG & E is going to be
8 embarrassed or very convincingly argue its oppressed or
9 even annoyed. Is that going to apply to, you know, big
10 institutional taxpayers or is this, you know, more of
11 definition that's targeted at individuals who don't want
12 their life ruined?

13 MR. HELLER: Well, I think there was no intent
14 of narrowing the definition to avoid certain taxpayers.
15 And it was actually -- this is the definition that is
16 used in the CCP for -- basically for -- that defines
17 what -- what a Superior Court can seal or take any other
18 action, like to go in camera or anything.

19 So, it's really a broad definition that courts
20 use to describe all of the confidential information
21 that's subject to their authority to protect.

22 So, that was really -- I did look at some
23 other -- I looked at the Tax Courts rules and things
24 like that and we're very, very amenable to the way --
25 the procedures that we have outlined here and their
26 definitions didn't seem to work very well and I feel
27 California law would be better than the very specialized
28 federal tax law.

1 But to the extent that there is some better
2 language or something that we would be able to define,
3 the only other reason -- I should say I also chose that
4 because it does have a lot of case law underneath those
5 definitions.

6 MR. MICHAELS: I will take a look.

7 MR. HELLER: And I did find that in there. So,
8 the case law is tied in there as a part of --

9 MR. MICHAELS: Good

10 MR. HELLER: -- well, in subdivision (F), it
11 specifically references the judicial history, so --

12 MR. MICHAELS: I'll take a look at those
13 interpretations.

14 MR. HELLER: You're trying to make it something
15 that would have some definitive, you know, measure
16 because the interested parties did make it very clear at
17 the last meeting on Part 5 that they really didn't
18 want -- they didn't want an ambiguous standard, that
19 they wanted something that would be clear and you could
20 tell when something is confidential.

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1 MR. KAMP: Steve Kamp. I was not -- Steve Kamp
2 from Board Member Yee's office. I would note that this
3 position governs PG&E, for example --

4 MR. MICHAELS: I don't represent PG&E, by the
5 way.

6 MR. STEVE: But I -- I want to say -- you're
7 right, you're not. I'm just using this. Anybody
8 who -- it governs anybody who goes into Superior Court.

9 The other point I would make, though, is I
10 think elsewhere in these -- in Alternative 2 you
11 basically have the Chief Counsel making a recommendation
12 to the Board Chair.

13 I think -- because this is going to be more
14 work, I know that the Board has requested a budget
15 augmentation for public -- for responding to Public
16 Records Act requests.

17 I think you might try to use some of those
18 resources for this work.

19 MR. HELLER: And just real quickly to follow up
20 with that, that -- we did remove -- well, I should say
21 the definition for "Chief Counsel" at the beginning of
22 this part does include the Chief Counsel or his or her
23 designee. So, in every type -- instance where you're
24 seeing "Chief Counsel", the Chief Counsel will be
25 probably delegating the -- the actual function and --

26 MR. KAMP: But I'm just bringing that up.

27 MR. HELLER: Yes.

28 MR. KAMP: Because you had me aware, that is

1 where you could probably use the resources the Board
2 supposedly, I believe, would be having.

3 MR. HELLER: Right. Yeah.

4 Yes, I think that's very good.

5 And we're really hoping -- also, I think,
6 in -- previously, in the prior procedure was all
7 directed towards the Chair. This gives the Chair some
8 advice from the -- from the head attorney for the
9 agency on -- on the judicial standard, whether something
10 is in fact confidential or trade secret.

11 And so I think that it represents a -- an
12 improvement, at least, in that respect, procedurally.

13 And just --

14 MR. KOCH: Brad, Al Koch again.

15 MR. HELLER: Please.

16 MR. KOCH: I'm afraid I didn't -- I didn't
17 understand your answer to my previous question.

18 MR. HELLER: Okay.

19 MR. KOCH: Are you saying that trade secrets
20 can be disclosed in -- in the briefs of -- of the Board?

21 MR. HELLER: Well, the way that this would --

22 MR. KOCH: Under -- under (e)(1)(B).

23 MR. HELLER: The way that (e)(1) -- well, let's
24 put it this way.

25 MR. KOCH: Because those are public documents.

26 MR. HELLER: Right.

27 Well, let's put it this way, they -- they're
28 public documents -- briefs are public documents only in

1 certain circumstances.

2 So if we're talking about an appeal from the
3 Franchise Tax Board or a Property Tax case, then the
4 briefs themselves can become public records. And so
5 you're -- you're absolutely correct with having a
6 concern about any kind of confidential or trade secret
7 information that can be in those.

8 And what this essentially says here in
9 (e)(1)(A), and I'm back on -- on page 49 here, is that
10 when the Board goes ahead and responds to a Public
11 Records Act request for one of those two types of
12 briefs, we're going to go ahead and redact out the type
13 of information that's been included here.

14 So, you're not prevented from discussing it in
15 your brief. We're just going to make sure that we don't
16 respond to a Public Records Act request by including
17 that.

18 And this is what -- I should say that's all
19 that (e)(1)(A) says, is that the Board's not going to
20 provide this information. What -- what (e)(1)(B) says
21 it then goes back to really what your question is, and I
22 think it says -- it says here you're not -- you're not
23 going to -- it doesn't prohibit any party from referring
24 to the information described in this paragraph in their
25 briefs. So, it's specifically saying you can file your
26 briefs and put it in there. And as I explained, it's
27 going to be the Board's staff's job to get it out if
28 there's a Public Records Act request.

1 And then it says even further that when you get
2 to the oral hearing and you want to, let's say,
3 reference this type of thing outside of a closed
4 session, it permits you to discuss it in a manner that
5 won't disclose the actual name or information or
6 whatever.

7 So -- so, we're hoping that we can still
8 facilitate the hearing but protect like the -- you know,
9 the Social Security number of everyone's dependence in
10 an Income Tax appeal, for instance, would be our goal.
11 Or -- or partnerships' lists of bank account numbers, or
12 something to that effect would be what we're trying to
13 get at here.

14 Does that help address the question?

15 MR. KOCH: Yes. Perfect. Thank you.

16 MR. MICHAELS: And it -- it does -- you did
17 highlight "in briefs" but, you know, the antecedent
18 there, nothing shall prohibit -- prohibit a Board Member.

19 Well, Board Members don't write briefs. Board
20 Members don't --

21 MR. HELLER: That's true. So "Board Members"
22 could be deleted, I would think.

23 Board staff occasionally write briefs.

24 I think that would work, right?

25 MR. KAMP: Which -- which page are you
26 referring to?

27 MR. HELLER: Oh, he's on page 50 now.

28 MR. MICHAELS: The one that Al was talking

1 about? (e) (1) (b) .

2 MR. HELLER: (e) (1) (b) , it's the very top of
3 page 50.

4 MR. MICHAELS: "Nothing in this paragraph shall
5 prohibit any party to a Board hearing, Board Members."

6 MS. MANDEL: Well, but from referring to the
7 information.

8 MR. LANGSTON: Referring to it.

9 MR. MICHAELS: Oh.

10 MS. MANDEL: So, at the Board hearing I -- I
11 should --

12 MR. MICHAELS: From referring to it, yeah.

13 MS. MANDEL: -- I -- I should say XYZ --

14 MR. MICHAELS: Yeah. No, it's correct.

15 MR. KAMP: Steve Kamp. You also have to --

16 MR. MICHAELS: It's right the way it is.

17 MR. KAMP: Steve -- Steve Kamp. You also have
18 to do it in a situation you don't disclose this -- you
19 know, this taxpayer identifying information.

20 I would also recommend that the word "Board
21 Member Staff" be added to this --

22 MR. HELLER: Okay.

23 MR. KAMP: -- because it's left out there. And
24 I'm not quite sure what the intent of doing that was,
25 but, yeah.

26 MR. HELLER: Okay.

27 MR. HUDSON: I think how that comes up, yeah.

28 MR. HELLER: Let's see.

1 And I think that's pretty much -- it just wraps
2 up, there's a 5000.5033.3, that's the final part of
3 Alternative 2. And that just basically refers to the
4 Board's limited attorney-client privilege and just
5 points out that none of this was intended to waive the
6 Board's attorney-client privilege to the extent that
7 it's provided under the Evidence Code.

8 In fact, that should be fixed.

9 MR. MICHAELS: So, is there an attorney -- it's
10 the Tax and Fee Division that represents the Valuation
11 Division. Is there an attorney-client relationship
12 between the Tax and Fee Division and the elected Board?

13 MR. HELLER: Between the Tax and Fee --

14 MS. MANDEL: In -- in Legal Department, right.

15 MR. HELLER: In the Legal Department? I
16 believe so. There should be. Where they -- the entire
17 Legal Department --

18 MR. MICHAELS: I guess I'm just wondering --

19 MR. HELLER: -- is the attorneys for the Board.
20 And then --

21 MR. MICHAELS: So, is there something that
22 could become germane to a case where I'm representing
23 the taxpayer, where an attorney of the Board is -- is
24 precluded from disclosing that to me?

25 MR. HELLER: Hmm-hmm.

26 MR. MICHAELS: Because it's advice that the
27 attorney for the -- the Board is giving to the Board to
28 support its initial determination.

1 MR. HELLER: Uh-huh. Well --

2 MS. CROCETTE: I'm -- I'm a little confused by
3 that. That -- this is Sabina. I mean, all the
4 arguments that they give us are usually represented --
5 and I know there's an issue of us calling for further
6 clarification, but are represented in the -- the D & R.
7 So, I -- I'm not completely understanding what you're
8 saying, Peter.

9 What -- what are you talking about? It's not
10 clear from what you just said.

11 MR. MICHAELS: Yeah. I -- I was thinking more
12 again in the State assessee context than the D & R
13 context. But in the State assessee context --

14 MS. CROCETTE: Okay. Well, whatever they call
15 those -- those written things, that's -- that's what I'm
16 referring to.

17 MR. MICHAELS: Yeah, well --

18 MS. CROCETTE: What's the name for them in the
19 State assessee scenario?

20 MR. MICHAELS: Well, there's -- okay, so
21 there's a lawyer who represents the Valuation Division
22 and the Valuation Division is a party, right?

23 Does that lawyer have some kind of
24 attorney-client privity with the elected Board that
25 would preclude disclosure of work product to the
26 taxpayer whose controversy is in -- is in front of the
27 Board?

28 MS. MANDEL: Other -- other than the hearing

1 summary brief document that they file.

2 MR. MICHAELS: Yeah.

3 MR. HELLER: There's potentially, I think, a
4 commun -- this is Bradley Heller. There's -- there are
5 potential communications, and my thinking would be
6 normally it would not happen in the context of --

7 MR. MICHAELS: It happens all the time.

8 MR. HELLER: -- direct communication with a
9 Board Member on a case, because typically they do
10 provide their rationale and they do indicate what
11 they're thinking when they're -- they're ruling on a
12 particular case at an oral hearing.

13 But -- but as far as -- and I think normally
14 when staff's trying to communicate on an issue that --
15 that's sensitive, that we would want to maintain an
16 attorney-client privilege on it's not typically related
17 to a specific case outside of something that's already
18 in litigation and there's other issues related to that.
19 And those are generally discussed with the Board Members
20 in closed session, and also have a whole bunch of other
21 rules.

22 So I do think there's -- there's some potential
23 out there. I don't know, I can't give you a specific
24 example, though, at this time.

25 MR. MICHAELS: Okay. Well --

26 MR. HELLER: I do think there's -- I don't
27 know, it's very -- it's one of those fairies on the tip
28 of a pin kind of issues, but I think there is in fact

1 some limited group of things that might be there.

2 And essentially that wraps up Alternative 2 for
3 disclosure. And so that's the function set out there,
4 to -- to achieve a little additional disclosure as well
5 as providing that disclosure in advance of the hearing
6 so that a person attending an open meeting could go
7 ahead and understand the proceedings that's being
8 presented in front of them.

9 And then also I think it would create just a --
10 it creates a slightly larger record for people even
11 after the hearing for Public Records Act request, and
12 explains how we deal with those.

13 With that, are there any other questions or
14 comments on disclosure? Diane.

15 MS. OLSON: It's not a disclosure, but for some
16 people that did arrive late, would you let them know
17 when their public comments --

18 MR. HELLER: Oh, absolutely.

19 MS. OLSON: -- would be received?

20 MR. HELLER: Real quickly, for everybody who
21 didn't hear me this morning, we're not establishing any
22 firm deadlines for public comments and staff definitely
23 wants to hear from all the interested parties and will
24 do so at any time.

25 What we're -- our dead -- right now we do have
26 some deadlines for when staff is expected to submit some
27 things to the Board. So, if we receive things in time
28 to be incorporated, that would be appreciated. However,

1 we're not putting it in firm deadlines and, real
2 quickly, staff's deadlines for presenting information to
3 the Board are as follows as of right now.

4 Parts 1 and 2 dealing with Business Taxes and
5 the intent for all of the rules are -- are scheduled to
6 go before the Board on April 18th. And so, any --
7 really, it's -- we would have appreciated comments
8 already if there were any, but -- but certainly people
9 are able to show up at the hearing, as well, and comment
10 if they'd like or submit written comments up to that
11 date. And certainly throughout the formal rulemaking
12 process once we get there.

13 Also, Parts 3 and 4, dealing with Property Tax
14 and Appeals from the Franchise Tax Board are currently
15 scheduled to go before the Board Members on May 17th.

16 And then Part 5, which we're discussing today,
17 is scheduled to go before the Board Members on June
18 27th.

19 MR. KAMP: So -- Steve Kamp from Board Member
20 Yee's office. So, consistent with those deadlines, when
21 should people get their comments in to you?

22 MR. HELLER: Well, for us, if we can get them
23 three weeks before those deadlines, then we can
24 definitely consider them and incorporate any kind of
25 changes that might be necessary.

26 MR. KAMP: So, you're saying 21 calendar days?

27 MR. HELLER: Yes, 21 calendar days as opposed
28 to business days.

1 MR. KAMP: Okay.

2 MR. HELLER: Although, like I said, we're -- we
3 want to hear your comments, so send them in anyway, even
4 if it's beyond that and we'll do our best to incorporate
5 whatever we can.

6 MR. KAMP: Yeah.

7 MR. HELLER: There are just limitations on our
8 executive review process and things like that.

9 MR. MICHAELS: Do you know or does anyone in
10 the room here know what kind of -- do they -- does the
11 Board have a full normal regular docket on the 17th of
12 May?

13 MS. MANDEL: Yeah, the --

14 MR. MICHAELS: Oh, Gary -- Gary, he would know.
15 So it's not just a --

16 MS. MANDEL: I -- I asked him that yesterday.

17 MR. MICHAELS: What's that?

18 MS. MANDEL: I asked him that yesterday.

19 MR. EVANS: It's a full -- it will be a full
20 day.

21 MR. MICHAELS: So -- okay, so it's not just
22 value setting.

23 MR. EVANS: No.

24 MR. HELLER: Oh, no.

25 MR. MICHAELS: Okay.

26 MR. HELLER: And I believe all these different
27 dates are full schedule Board meetings with a full
28 calendar, as well. So -- and I believe when we took

1 Parts 1 and 2 to the Board Members on January 31st, we
2 did make it on to the calendar at about 5:15 or
3 something like that.

4 MR. MICHAELS: It's just that usually the --
5 the event that's happening on May 17th used to be the
6 exclusive activity when the Board met.

7 MS. MANDEL: Oh, that was a long time ago.

8 MR. MICHAELS: Not that long.

9 MS. MANDEL: Yeah.

10 MR. HELLER: But those are the dates --

11 MR. MICHAELS: You're just old.

12 MR. HELLER: Sure. For the June 27th, what
13 would that be? I don't know.

14 MS. RUWART: That's a Tuesday. And
15 approximately 21 days before would be the 6th.

16 MR. MICHAELS: 6-6-6.

17 MS. RUWART: 6th of June. Yeah, 6-6-06.

18 MR. HELLER: Perfect.

19 MR. KAMP: And the May 17 -- the May 17th will
20 be what? April 27th?

21 MS. RUWART: Hang on. Probably. 2 -- April
22 26th is a Wednesday.

23 MS. MANDEL: Yes, it is.

24 MR. HELLER: A Wednesday. But once again, you
25 know, staff definitely wants to hear your comments and
26 other Board Members want to see them, as well.

27 And my -- and, also, as I indicated, and I
28 don't think I said this this morning, but our goal is to

1 get the Board Members to approve all the language for
2 all the different parts first. Then to request
3 permission to go ahead and publish our regulatory notice
4 and begin the formal rulemaking process with all the
5 regulations as a packet.

6 So, we may or may not be requesting permission
7 to publish on -- at the June 27th Board meeting since we
8 may or may not have everything approved by that time,
9 and the Board may want to consider how we go into the
10 rulemaking process.

11 Once we do that, there will be also additional
12 notice and comment periods there, as well.

13 So, certainly no cutoff coming any time soon.

14 MR. MICHAELS: And is there a -- a target date
15 for ultimate adoption? Is it December or November or
16 January or February or --

17 MR. HELLER: That's -- I think we're looking --
18 we're thinking something into the four to six months
19 from when we start the -- the formal --

20 MR. MICHAELS: Six --

21 MR. HELLER: -- formal rulemaking process. So,
22 if it was starting -- say in August then the end of the
23 year would probably be somewhere in there.

24 MR. MICHAELS: So, it's a different Board of
25 Equalization.

26 MR. HELLER: Would be getting seated --

27 MR. MICHAELS: Different Board.

28 MR. HELLER: -- right around that time period,

1 yes.

2 MR. HUDSON: Which I'm sure all of them would
3 agree on everything we talked about.

4 MR. MICHAELS: You -- you already know who's
5 going to be on the Board, I suppose.

6 MR. HELLER: Yeah. Correct.

7 But, anyhow, that is -- that's the plan as of
8 right now. And all of those are just loose dates.
9 They're just intended to give you an idea.

10 MR. MICHAELS: Yeah, I was mostly just looking
11 at, you know, the transition here. Are we going to be
12 back to square one if this doesn't all get effected by
13 January 6th or whenever date they get sworn in?

14 I mean, theoretically, we may be back. It may
15 be much ado about nothing.

16 MR. HELLER: Right.

17 MS. RUWART: Are there any more comments or
18 discussion about these particular disclosure
19 alternatives? Not to say that we can't pick them up
20 afterwards, but if that's the case I would say now would
21 be a good time to take our lunch break.

22 We should come back at 1:20 and we'll go
23 through the rest of the detailed sections.

24 Thank you. See you in an hour.

25 ---oOo---

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1 MR. FOSTER: Good afternoon. Looks like we're
2 going to discuss the regulations regarding the Board
3 Members and disclosure and this afternoon we're going to
4 move to on to everything else.

5 My name is Ian Foster, for those of you who
6 don't know me. I'm an income tax Appeals attorney at
7 the BOE.

8 And why don't we go around and introduce
9 ourselves again?

10 MR. HELLER: I'm Bradley Heller, an attorney
11 with the Board's Legal Department.

12 MR. MICHAELS: I guess -- I know I'm Peter
13 Michaels, Cooper, White and Cooper in San Francisco.

14 MR. SHAH: What law firm?

15 MR. LANGSTON: I'm Bruce Langston from
16 Franchise Tax Board.

17 MR. DAVIS: Ken Davis, Franchise Tax Board.

18 MR. EVANS: Gary Evans, Board Proceedings.

19 MR. KAMP: Steve Kamp, Board Member Betty Yee's
20 office.

21 MR. GILBERT: Arlo Gilbert, Fuel Taxes
22 Division.

23 MS. SIMPSON: Laureen Simpson, Board of
24 Equalization Taxpayer Rights Advocate's office.

25 MS. OLSON: Diane Olson, Board Proceedings
26 Division.

27 MR. KOCH: Al Koch, Tax Counsel, M. B. I. A.

28 MS. OLSEN: Joanna Olsen of Franchise Tax

1 Board.

2 MR. FOSTER: And those of you on the phone,
3 would you please introduce yourselves again for the
4 record?

5 MR. SHAH: Neil Shah, for Mr. Parrish.

6 MS. CROCETTE: Sabina Crocette with Board
7 Member Betty Yee's office and Jim Herd is also on the
8 line.

9 MR. FOSTER: Thank you very much.

10 I suppose we should begin. Do you have any a
11 introductory remarks again?

12 MR. HELLER: Real briefly, this is Bradley
13 Heller.

14 Just briefly, we did receive written comments
15 from the Franchise Tax Board and we have provided those
16 to the participants here.

17 We also received a copy of a disclosure -- a
18 settlement disclosure agreement, I believe?

19 MR. DAVIS: Nondisclosure.

20 MR. HELLER: Settlement nondisclosure agreement
21 for the FTB to provide an example of the types of terms
22 that taxpayers agree to before they enter into
23 settlement negotiations with the Franchise Tax Board.

24 And Board staff here at the Board of
25 Equalization will be looking into the Franchise Tax
26 Board's suggestions to change the language regarding --
27 regarding the admissibility of settlement negotiations
28 and information pertaining thereto and is going to take

1 a look at that agreement and also raise the same
2 concerns that the Franchise Tax Board's raised with our
3 Settlement Department to see what similar issues are
4 being -- are presented by both agencies and may very
5 well be changing the language slight to incorporate some
6 of those suggestions.

7 But at this point it's being considered and the
8 notice was made. It seems to be a very relevant
9 concern.

10 Other than that, the only other thing I'd
11 mention is that we're definitely going to look at adding
12 a definition of "Board Member staff" to the definition
13 section. So, I'll point that out again.

14 Otherwise, let's go ahead and start from the
15 top.

16 MR. FOSTER: Thank you, Brad.

17 I will be going through section by section. I
18 will give a chance for comments on every section. And I
19 will working off the underlined and strike through
20 version and the page numbers on that version as well. -

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SECTION 5000.5001
GENERAL APPLICATION

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MR. FOSTER: Let's start with Section 5001.
Any comments on the general application
section?

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SECTION 5000.5002
DEFINITIONS

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MR. HELLER: Section 5002, definitions.
MR. DAVIS: Ken Davis. We only have one real
suggestion.

There's is some small, minor issues that we put
in our commentary to Board of Equalization, but just --
the word "person" that is in the definition of -- in (M)
for the definition extreme hardship and in reasonable
cause, we're suggesting that a definition for the word
"person" be included in the regulations or that Board
staff consider using the Revenue and Tax Code
definitions. The reason we're suggesting this is really
more for the taxpayer that really does not know the
Code, maybe that taxpayer is a sub S corporate taxpayer
and will want know what "person" means according to the
view of the Code or as applied in the regulations.

MR. FOSTER: Thank you, Ken.
Any other comments on Section 5002 definitions?
MR. MICHAELS: Peter Michaels speaking.

1 And I understood there was going to be a
2 definition for Appeals Division also?

3 I don't know if that goes here or in Part 3.

4 MS. MANDEL: That was from the discussion we
5 had on another part of the rule. And there were some --
6 there were some provisions that were all going to wind
7 up in the front and --

8 MR. HELLER: There were, that was for --

9 MS. MANDEL: Maybe they're not all done.

10 MR. HELLER: Those were for Chapter 4, it was
11 our -- Chapter 3, the part dealing with property tax is
12 what Marcy is referring to.

13 In here though we did add -- for Part 5 we
14 added a definition for Appeals staff, since they're
15 discussed with reference to hearing summaries.

16 The Appeals Division, I mean we could add a
17 definition for the Appeals Division.

18 MR. MICHAELS: Well, you know, just make a note
19 of it. Carole knows about this. We talked about it the
20 other day and she knows about it.

21 And maybe it's picked up somewhere else.

22 MR. HELLER: This may be the better place to
23 have it.

24 MR. MICHAELS: I don't know.

25 MS. MANDEL: And she had told us, I think, that
26 all of the definitions were going -- whatever became
27 Part 1 of the whole thing, when everything got
28 rearranged, that all of the definitions were going to be

1 moved up to the front or something?

2 MR. MICHAELS: There were --

3 MR. HELLER: That was with regard to that --
4 just the chapter part dealing with property tax.

5 We were talking about restructuring that one
6 since the structure was a little bit off and moving all
7 of the definitions that were in that chapter to the
8 front so that somebody could go to one definitional
9 section.

10 That is being done, but like -- that's going to
11 be very similar to this part, which has definitions up
12 front as well.

13 But that -- that part that she's working on
14 will incorporate these definitions where they don't
15 conflict. So this may be the appropriate place to add
16 Appeals Division and then she can reference it in that
17 other part and for all the different programs.

18 So, I will make a note of it, as Peter
19 suggested, and we may go ahead and create an Appeals
20 Division definition.

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5000.5003

BOARD MEETINGS

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MR. FOSTER: Unless there are other comments,
moving on to Section 5003, Board meetings.

I am on page 7 right now, by the way,
underlined and strike-over version.

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5000.5004

ANNUAL ADOPTION OF BOARD MEETING CALENDAR

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MR. FOSTER: Section 5004, adoption of Board
meeting calendar?

MR. KAMP: Steve Kamp, Board Member Yee's
office.

I note it says in subdivision (A) it says,
"All hearings on property tax petitions shall
be conducted at Board meetings held in
Sacramento."

I would -- usually that's what the Board does,
but I don't know if people remember this we occasionally
have held property tax petition hearings in Culver City.

MR. MICHAELS: At LAX.

MS. MANDEL: Torrance, there was one at
Torrance.

MR. MICHAELS: Yeah, we've had them all over
the place.

We had a value setting in San Diego one year.

1 MR. FOSTER: Back to 5003?

2 MS. MANDEL: Yeah.

3 Is there -- is that in something we have
4 currently? Or is that -- I mean I think that the Board
5 has, because of all of the amount of valuation staff and
6 the fact that the records are here, prefers to do them
7 here, but, yeah, they have been once at other places,
8 so, I --

9 MR. MICHAELS: Where is this section?

10 MR. SHAH: 5003.

11 MR. FOSTER: 5003(a).

12 MS. MANDEL: Right at the top.

13 MR. MICHAELS: Monthly meetings?

14 MS. MANDEL: The last sentence.

15 MR. MICHAELS: Okay,

16 "All hearings on property tax petitions,"
17 uh-huh, right.

18 Presumably that covers all property tax
19 petitions, all -- not just the State assesses.

20 MR. KAMP: If I would -- there is another
21 ambiguity --

22 MR. MICHAELS: Section 11?

23 MR. KAMP: -- immediately preceding section
24 says, "outside the Sacramento area," whereas other
25 references to Sacramento are just to Sacramento, period.

26 I don't know why you need to put the word
27 "area" in there.

28 MS. MANDEL: Because they might live in Davis.

1 MR. HUDSON: Tom Hudson.

2 I talked to Bill Leonard specifically about
3 this point. And he specifically asked me to say he
4 doesn't want the rule to say that we can only conduct
5 property tax hearings in Sacramento, even if for
6 practical reasons he might agree, as a practical matter
7 and to save money, that's a good idea, but he want that
8 tin the rules.

9 I just want to make sure that --

10 MS. MANDEL: Yeah, that's probably one of those
11 details.

12 MS. HUDSON: -- that's an option, not a rule.

13 MR. HELLER: Just as a question, do you think
14 it's delete the entire reference or change it so that
15 it's more general?

16 So that it's generally that we do that or just
17 get rid of it entirely is more idea of it?

18 MR. MICHAELS: I would get rid of it entirely.
19 You're less constrained by it.

20 MR. KAMP: I'd like to agree with Mr. Leonard's
21 recommendation, but that's what I would do.

22 MR. HUDSON: Bill Leonard only told me that he
23 doesn't want it to say only in Sacramento since he
24 represents a lot of places that are not Sacramento and
25 if it's at some point more convenient to meet at LAX, he
26 doesn't the rules to say we can't.

27 MS. MANDEL: Right. Well, you might -- if you
28 want to, you could ask him whether he wants out totally

1 or whether generally property tax petitions are held in
2 Sacramento.

3 But it may be better just to have it out
4 totally, that's what Brad is asking.

5 MR. MICHAELS: Well, generally most hearings
6 are held in Sacramento

7 MS. MANDEL: No -- that's true, that's true.

8 MR. HELLER: So, I mean -- anyway, staff, I
9 think, though, you know, is -- could be amenable to
10 either -- either alternative of just deleting it
11 entirely or retaining the idea of letting people have
12 notice that they're generally in Sacramento.

13 But that the Board -- that doesn't constrain
14 the Board's authority to hold them somewhere else.

15 But, either way, the staff would be all right
16 with that.

17 MS. MANDEL: Don't the other hearings -- don't
18 you -- isn't our process if you have another kind of
19 case that you -- you request the hearing somewhere else
20 if you want it somewhere else, you request a hearing in
21 San Diego?

22 MR. HELLER: That's correct.

23 MS. MANDEL: But this falls -- this other thing
24 falls into our sort of general -- don't make it so
25 specific that you tie up the Board's ability to handle
26 the process as it sees fit, right?

27 MR. HELLER: Maybe I could suggest that staff
28 will tentatively plan on deleting the language unless we

1 hear otherwise from other interested parties or our
2 executive management to the contrary.

3 So as of right now I will make a note to delete
4 it. And then if anybody has other comments, they can go
5 ahead and submit them and we'll see if there's other
6 alternative language that has some support.

7 MR. FOSTER: Very well. Section 5004.

8 MS. MANDEL: So, the Board Chair has discretion
9 to --

10 MR. MICHAELS: Where does this one start? Oh,
11 I see, okay, the Board.

12 MS. MANDEL: -- set up any meeting any other
13 time?

14 MR. KAMP: Steve Kamp for Board Member Yee's
15 office.

16 Looking at subdivision (c),
17 "The Chief of Board Meetings may cancel a
18 portion of a Board meeting."

19 I know that's what we've been doing, but I
20 wonder if that shouldn't be at the discretion of the --
21 you know, that they can recommend that the Chair cancel
22 it, as opposed to just --

23 MR. MICHAELS: Unilateral?

24 MR. KAMP: Yeah.

25 MS. MANDEL: Especially since now you've taken
26 out, "for lack of workload."

27 MR. MICHAELS: That's never been an issue.

28 MS. MANDEL: Well, that's usually when they

1 get --

2 MR. HELLER: So, we like, "The Board Chair may
3 cancel."?

4 Then we internally --

5 MR. KAMP: Or you can say the Chief of Board
6 Proceedings or the Board Chair may cancel, yeah.

7 MR. EVANS: Excuse me, Gary Evans.

8 Typically the Chief of Board Proceedings has
9 been given the discretion for lack of work to cancel a
10 day -- not the entire meeting. So --

11 MR. KAMP: That's right.

12 MR. HELLER: A portion.

13 MR. EVANS: I mean I seriously --

14 MR. KAMP: It says here a portion of a Board
15 meeting.

16 MR. EVANS: When we set the Board meeting, it's
17 generally two days for Sacramento because --

18 MR. KAMP: Maybe we should just keep this --

19 MR. EVANS: It's a portion.

20 MR. KAMP: -- and raise this -- raise this at
21 our office and we may not have any issue, but this -- I
22 see that.

23 MR. HELLER: I will mark that there is an
24 issue.

25 MR. FOSTER: Gary, isn't the current practice
26 typically for Board Proceedings to check with the Chair
27 before canceling a day?

28 MR. EVANS: We do mention it.

1 MR. MICHAELS: And is "cancel" actually what's
2 happening here? Is it a postponement?

3 MS. MANDEL: No, cancel.

4 MR. MICHAELS: If the the meeting is cancelled,
5 it will never happen.

6 MS. MANDEL: Well, remember May?

7 We have May 17 and 18 is what the Board
8 originally adopted when we adopted the calendar.

9 And then there was lack of workload for two
10 days, so --

11 MR. MICHAELS: It's officially cancelled?

12 MS. MANDEL: -- they sent us a note saying,
13 "We're not going to -- we're canceling May 18th."

14 And if you look on the Board's website and you
15 pull up our whole calendar for the year, you won't see
16 May 18 any more.

17 MR. MICHAELS: So, the -- and you'll see a part
18 of a meeting could be cancelled, but not the entirety?

19 MR. HELLER: Well, that was the idea.

20 Well, the provision was designed to only
21 reflect that the Chief of Board Proceedings authority.

22 So, the Chief of Board Proceedings, as Gary was
23 pointing out, has historically had this discretion to
24 cancel a portion of a meeting and that's what it was
25 originally intended to describe is just that, a Board --

26 MR. SHAH: Maybe "upon consultation with the
27 Chair," or something?

28 MR. HELLER: I think that's always been, I

1 mean, I don't believe that the Chief of Board
2 Proceedings has ever cancelled a portion of a meeting
3 even without consulting with the Board Chair, but -- but
4 MS. MANDEL: Not be --
5 MR. SHAH: There might be reasons for them to
6 do it.
7 MR. HELLER: There could be a situation where
8 that would happen and this doesn't specify that they
9 would be required to.
10 So, there is some concern there.
11 Essentially then it's always been a vote of the
12 Board to cancel an entire meeting. So, if we had
13 scheduled the 17th and 18th and we want to cancel the
14 entire meeting, then that would take a vote of the
15 Board.
16 MS. MANDEL: Right, that's happened when the
17 Board meeting days are on.
18 MR. HELLER: That's essentially because the
19 Board itself is adopting the calendar. So, it's up to
20 them to decide to change the calendar.
21 We'll go ahead and I will make a note of the
22 issue regarding whether or not the Chief of Board
23 Proceedings should be consulting with people or whether
24 that authority should just rested in the Chair.
25 And I will wait to hear back from Mr. Kamp with
26 further concerns.
27 I won't take any actions right away.
28 MR. FOSTER: Any other comments on 5004?

1 SECTION 5000.5005
2 RIGHT TO ORAL HEARING

3 ---o0o---

4 MR. FOSTER: Section 5005, right to oral
5 hearing on page 8.

6 MS. MANDEL: I have to figure out why I put an
7 arrow here.

8 Oh, under (c) you have to make a request for
9 oral hearing within 30 days of the D & R.

10 I expect that if people made their request for
11 a hearing in their original petition -- didn't we talk
12 about this?

13 MR. MICHAELS: Yeah.

14 MS. MANDEL: Do they have to keep asking?

15 MR. MICHAELS: Yeah.

16 MS. MANDEL: So, if they made their original
17 request and then they don't make one after the D & R,
18 it's still counts?

19 MR. MICHAELS: They still get the hearing.

20 MR. HELLER: Yes, it still counts.

21 We have added language that we'll come to
22 later.

23 MS. MANDEL: I mean, assuming that they lost.

24 MR. HELLER: That actually would say to -- that
25 would basically say to -- there is language that we have
26 added that directs staff to inquire to -- of a taxpayer
27 where they have not submitted an additional request, but
28 did raise a request in their petition, and to inquire of

1 them whether they still want that oral hearing.

2 So, there is a procedure to fix that situation.

3 ---o0o---

4 SECTION 5000.5005.1

5 ACKNOWLEDGEMENT OF REQUEST FOR ORAL HEARING

6 ----o0o---

7 MR. FOSTER: Page 9, Section 5005.1,
8 acknowledgement of request for oral hearing

9 MR. HELLER: This is the same.

10 If you look in subdivision (a) -- this Bradley
11 Heller.

12 The subdivision (a) actually talks about the
13 confirmation of a previously requested hearing. So,
14 says if Board staff receives a written request for oral
15 hearing, which would be the one we were just describing,
16 or confirmation that a previously requested oral hearing
17 was still desired, it would cover people who had
18 requested one previous, like in the petition, for
19 instance, then we'll issue the letter acknowledging the
20 request.

21 MS. MANDEL: Al?

22 MR. KOCH: I guess my question is why the 30
23 day? I mean, it sounds like it could be any time. Why
24 has the 30 days notice been dropped, the
25 acknowledgement?

26 MR. HELLER: Well, dropped the 30 days?

27 MS. MANDEL: Well, because isn't this whole
28 thing here new, the 5005?

1 MR. HELLER: Well --

2 MS. MANDEL: Where you put the -- because it's
3 all underlined and you move the 30 days over here
4 (indicating)?

5 That's what it looks like.

6 MR. HELLER: Well, I think he's asking -- Al,
7 you're referring to acknowledging the request within 30
8 days, correct?

9 MR. KOCH: Yeah.

10 MR. HELLER: Okay.

11 MR. MICHAELS: Well --

12 MR. KOCH: To give the taxpayer comfort that
13 something has happened.

14 MR. MICHAELS: I mean, it says, "approximately
15 30 days," it's a bit vague to start with.

16 You know, locally you always get an
17 acknowledgement, but it might not be within 30 days.

18 MR. KOCH: Well, that's not the --

19 MS. MANDEL: Well, you can't -- if within 30
20 days after the Appeals -- after the D & R, that's the
21 time that you're supposed to ask for -- write in for a
22 hearing, so, those would sort of not -- those would
23 cross, not mesh or something.

24 MR. HELLER: I think -- I don't know. I think
25 the real concern is just the first version of this
26 section we had required basically we said the Appeals
27 Division would acknowledge -- sorry, the Board
28 Proceedings would acknowledge the request for an oral

1 hearing within 30 days, essentially, that's what that
2 was.

3 MS. MANDEL: That Board Proceedings --

4 MR. HELLER: I believe the language is right,
5 Board Proceedings staff. So, it's,

6 "Approximately 30 days after receipt of the
7 Appeals Division decision on petition or appeal
8 the taxpayer shall receive a letter from Board
9 Proceedings Staff."

10 Yeah, I think -- you know what, I think that
11 whole thing was deleted because the whole -- I think the
12 whole way it was set up just did not --

13 MR. MICHAELS: It was sideways.

14 MR. HELLER: It didn't make a whole lot of
15 sense as originally written because I think what it was
16 trying to direct us to do wasn't clear in and of itself,
17 what the original direction was.

18 And so I clarified the language to make it
19 clear that what we were trying to do was actually
20 acknowledge the receipt of these requests, which I don't
21 think was completely clear.

22 And then I did delete the time frame, but I
23 don't think there was an intention to give staff more
24 time or something like that. But I think it was just
25 a part of clarifying the language.

26 So, I think it's something we could probably
27 put a 30 day time limit back in, but I think it was
28 originally approximately anyway, so --

1 MS. MANDEL: Well.

2 MR. HELLER: -- certainly wouldn't be a case
3 where we'd move forward and not acknowledge it before --

4 MR. KOCH: What's the rule under Chapter 4? I
5 don't remember.

6 MR. HELLER: Chapter 4?

7 MR. FOSTER: Chapter 4?

8 MR. HELLER: I don't think they talk about it.

9 MS. MANDEL: I think you have to make it in
10 your appeal, don't you?

11 MR. FOSTER: Yeah, in Chapter 4 you have to
12 make the request before the end of briefing on the
13 appeal.

14 You can make it after that if you have
15 reasonable cause.

16 MR. HELLER: But I believe all of the chapters
17 do play into this provision.

18 This is the provision that deals with the Board
19 Proceedings Division now acknowledging that you have
20 requested an oral hearing, which could have been done at
21 any time.

22 But it's now Board Proceedings who's going to a
23 schedule the oral hearing. So, at some point they have
24 to acknowledge that there has been a request and it's
25 been scheduled for the --

26 MR. KOCH: Yeah, the process or the procedure
27 the cities have been working under is a little different
28 because they have to -- they opt in or out, depending

1 upon a date -- the date the inquiry was filed.

2 So --

3 MR. HELLER: Okay.

4 MR. KOCH: -- once they're in -- or if they're
5 not in, then they don't have the right to a hearing.
6 That's the difference.

7 MR. HELLER: And so if there's one that had
8 opted in, then that one we would still acknowledge, I
9 think, kind of on the same approach.

10 MR. KOCH: Yeah.

11 MR. HELLER: And say, "By the way, you've now
12 left the, say, Appeals level --"

13 MR. KOCH: Yeah.

14 MR. HELLER: "-- discussions and we're
15 scheduling you for an oral hearing. We're now
16 acknowledging."

17 MR. KOCH: Does not apply here anyway.

18 MR. HELLER: And, so, you know, I think it's
19 something if people are really concerned on staff maybe
20 not issuing acknowledgements promptly enough, that we
21 may be able to take a look at the language, but right
22 now I think we've been doing pretty well and since we
23 never move forward with an oral hearing before we've
24 acknowledged it, it doesn't really deprive the taxpayer,
25 other than just maybe the fact that interest might
26 accrue if we were to take our time, but it's something
27 that's always a concern with everything that we do,
28 so --

1 MS. MANDEL: I have a question on the very last
2 sentence where -- so then, "acknowledgement letters,"
3 indicates, okay, we're going to give you the oral
4 hearing and it's going to be in Sacramento, Culver City,
5 or wherever.

6 Then the taxpayer contacts Board Proceedings
7 when it gets it if the hearing location must be changed.

8 MR. MICHAELS: What are you looking at, Marcy?

9 MS. MANDEL: I'm looking at that same 5005.1
10 acknowledgement, the last sentence says that,

11 "The taxpayer --"

12 MR. MICHAELS: Okay.

13 MS. MANDEL: -- when you get the
14 acknowledgement letter, of course, you know, if they
15 sort of wait a while and then realize, oh, my God, but I
16 was just sort of looking at the "must be changed."

17 MR. DAVIS: Actually -- I'm sorry, Ken Davis.

18 We actually put in the change here, even
19 thought this wasn't -- didn't apply to us, I think that
20 we wanted to just give some assistance to the Board
21 staff.

22 I think the sentence really is read with the
23 sentence before that, that is, once the acknowledgement
24 letter goes out, it will indicate the oral hearing and
25 if granted it will provide the location.

26 And then it goes,

27 "Taxpayers shall contact the Board Proceedings
28 Division upon receipt of the acknowledgement

1 letter."

2 And then we changed -- we are suggesting the
3 change, "to request a change in location," meaning if
4 it's -- if they really want a different location, they
5 need to send something back in.

6 MS. MANDEL: Yeah.

7 MR. DAVIS: I think that's the intent.

8 MS. MANDEL: Yeah.

9 MR. HELLER: It was, and it was just -- I don't
10 know.

11 MS. MANDEL: It was late at night.

12 MR. HELLER: It's original language that was in
13 the first proposal and still managed to hang on.

14 I do think that the FTB language is an
15 improvement and it carries out what we were intending,
16 which is that you can request a change of location.

17 MS. MANDEL: Okay.

18 MR. MICHAELS: Does it say anything about
19 happens to that request that suggests your request could
20 be approved or disapproved?

21 MR. HELLER: It's --

22 MR. MICHAELS: You don't want someone saying,
23 "Hey, it says, you know, I have right to
24 hearing in --"

25 MS. MANDEL: That's why I was sort of wondering
26 about the "must be changed."

27 MR. HELLER: That's correct.

28 Our intent wasn't to obligate the Board to hold

1 a hearing every place that a person receiving an
2 acknowledgement letter might want it to be held.

3 So, I do think we're going to look at accepting
4 the FTB's language, which essentially says, "If a
5 request for," excuse me, it's just to contact the Board
6 Proceedings to request a change.

7 MR. MICHAELS: To request?

8 MR. HELLER: Right.

9 MR. MICHAELS: To request? I am tighten it up
10 slightly rather than "to request."

11 MR. HELLER: To request.

12 MR. MICHAELS: That could be read by somebody
13 as meaning that it's you just have to ask.

14 MS. MANDEL: Ask and you shall receive.

15 MR. MICHAELS: I'd like to request Gene Pitney.

16 MR. HELLER: I don't know.

17 MS. MANDEL: I understand that.

18 MR. HELLER: We'll have to take a look at the
19 language and see if we can't improve on the FTB
20 suggestion. There's some room for that.

21 MR. MICHAELS: Could I ask a question about the
22 references here, please?

23 It looks like --

24 MS. MANDEL: Yes.

25 MR. MICHAELS: -- it looks like somebody threw
26 everything, including the kitchen sink in and just block
27 copied and pasted the same references, all inclusive,
28 for each section.

1 MR. HELLER: Right. And, unfortunately, I
2 would be more than happy to explain that, but this is
3 Chapter 5. It actually applies to, essentially, every
4 single program that we have at the Board. And it does
5 need to refer to the statutes that authorize the Board
6 to be even conducting this process for every single
7 program.

8 And, unfortunately, that is a lot of programs
9 and they have a lot of statutes and they all have, in
10 fact, individual ones that authorize each type of
11 review. So, for instance, if you wanted to discuss how
12 we handle a claim for refund of a business taxes matter,
13 that claim for refund has special statutes that
14 authorize the Board to handle that claim for refund that
15 are separate from its petition authorizations, its
16 rights to look at a protest, its ability to hear or
17 request for relief from interest or penalty.

18 MS. MANDEL: I think we need a Part 10.2, like
19 we finally did at Franchise Tax, a separate --

20 MR. HELLER: I agree.

21 MR. MICHAELS: But --

22 MS. MANDEL: -- administrative provisions for
23 each.

24 MR. HELLER: I agree. So, it's really
25 referencing the provisions that are being interpreted
26 to -- that basically are interpreted as this is part of
27 the Board's process --

28 MS. MANDEL: Would it --

1 MR. MICHAELS: Was there any selectivity?

2 Did anyone go through and say, "Well, this
3 one -- you know, this one really doesn't apply to the
4 acknowledgement of the request?

5 MR. HELLER: I really --

6 MR. MICHAELS: Or did everything just kind of
7 get thrown in?

8 MR. HELLER: Everything really didn't get
9 thrown in.

10 Generally -- generally, we looked at the whole.
11 Marcy?

12 MS. MANDEL: Well, I just have a suggestion
13 that -- if there is so many of them, that can you maybe
14 put -- would it make sense to put, "Relating to the
15 Sales and Use Tax law," then have all those sections,
16 "Relating to Cigarette Tax law," have those sections?

17 So that somebody who wants to go look up where
18 you are getting the authority, if they have a particular
19 kind of case, presumably they might actually recognize
20 section numbers as being in the general area, but that
21 will assist with Peter's questions.

22 MR. HELLER: Well, I think -- I mean, staff
23 can certainly try to explain which ones of these
24 sections apply to which programs and then identify
25 what they're -- you know, which part of each program the
26 section is referring to.

27 For purposes of OAL that's not the format that
28 they would want the note section to be published in.

1 MS. MANDEL: Okay.

2 MR. HELLER: But certainly for presentation to
3 the Board or to prepare something else that would help
4 interested parties, staff can do that.

5 But the truth is that I actually did this
6 myself. I went through, essentially, line by line,
7 looking through each Code trying to figure out, well,
8 what is it that we're authorized to do, where does that
9 come from?

10 If we're interpreting something, what is it
11 that we're interpreting?

12 And in many of these cases it is,
13 unfortunately, there is a bunch. In fact, if you look
14 at like the business tax, like, for instance, like sales
15 tax, there is provisions for all of the interest
16 abatement and all of the requests for relief because of
17 a disaster or because of reasonable reliance.

18 And then the right to petition, the right to
19 petition for -- against a jeopardy assessment, the right
20 to file an application for administrative hearing --
21 these are all things that if you are requesting a
22 hearing, we're going to have to acknowledge that
23 request.

24 And, as far as I could tell, those are the most
25 likely references for what it was we were doing and it
26 was not the intention to throw the kitchen sink in.

27 MR. MICHAELS: No, you were meticulous and I'm
28 sorry it came across the wrong way.

1 But I mean --

2 MR. HELLER: That's okay.

3 MR. MICHAELS: -- there's stuff that -- is
4 there stuff -- should we -- or is it the case that the
5 references are the same in every single section here?

6 Or are there some that are in some, but not
7 others and some that are in others but not some?

8 MS. MANDEL: I think there are differences
9 among them.

10 MR. HELLER: There are, yes.

11 MR. FOSTER: For example, income tax being my
12 area of expertise, Section 19047 says, "The Board shall
13 hear and determine an appeal." That's all it says.

14 And so all of these regulations are
15 interpretations of how to hear and determine the appeal.
16 So, it's inputted as a reference for every one of them.

17 MR. AMBROSE: Well, that's the authority.
18 That's not the reference.

19 Isn't the authority -- the authority's
20 different than the reference.

21 MR. LANGSTON: When you're doing a regulation,
22 you have to -- and, actually, I mean it's kind of okay
23 to dump everything in because OAL will bounce it back if
24 one of the code sections is not in there.

25 But I never heard them bounce it back if
26 there's an extra code section in there.

27 MR. MICHAELS: But the flip side is that we're
28 trying to make these user friendly.

1 I appreciate what Brad's doing and he -- you
2 know, it probably should end up carrying the day, but
3 we're trying to make this user friendly and, you know,
4 the typical petitioner or the sort of less experienced
5 lawyer for a petitioner, you know, might well say,
6 "Well, you know, we better look every one of these
7 things up here and --"

8 MS. MANDEL: That's why --

9 MR. MICHAELS: "-- vet them all and make sure
10 they're all true."

11 That's what I would do.

12 MS. MANDEL: -- that's why --

13 MR. KAMP: Steve Kamp for Board Member Yee's
14 office.

15 I think I have -- it may work, may not work.
16 Instead of having a list of numbers, that will make
17 everybody's eyes glaze over, why not break the
18 references up by tax program or fee program?

19 MS. MANDEL: Yeah. And just for -- I mean I
20 know that there is at least one Board Member that I have
21 heard say, "What exactly is your code section reference
22 for that reg or that statement in wherever?"

23 And, so, that's --

24 MR. MICHAELS: A reasonable question.

25 MS. MANDEL: It behooves staff to have been so
26 meticulous, but making it user friendly, like we've been
27 talking about, is -- I don't know that OAL would have an
28 objection to --

1 MR. HELLER: How about if -- I will contact
2 OAL see if they would allow us to prepare our note
3 section in a manner that has those sorts of annotations
4 in it so that you can tell which programs and code
5 sections apply to you.

6 MR. KAMP: I don't see why they wouldn't
7 because --

8 MR. HUDSON: Great idea.

9 MR. KAMP: You're not taking any information
10 out, you're just -- I could tell you from -- like the
11 1200 group are all insurance tax law.

12 MR. HELLER: Right.

13 MS. MANDEL: It's a trivia quiz.

14 MR. KAMP: You could -- I don't see why
15 OAL would object to that.

16 MR. HELLER: I don't know either.

17 MS. MANDEL: But we should just check before we
18 do the whole package and find out that they get their
19 whatevers --

20 MR. MICHAELS: My reaction was more from the
21 recipient's point of view, you know, where you say,
22 okay, I got us -- or they say they got the authority
23 under -- holy, moly.

24 I don't know what their authority is.

25 MR. HELLER: I agree. As a recommendation too
26 and to finish up the thought, if O. A. L. does have an
27 objection of some sort to adding it to the notes
28 section, then staff can go ahead and prepare a separate

1 document that shows it so that there is a
2 cross-reference guide for the interested parties and the
3 Board Members.

4 So, even though it may not -- the final
5 regulation published in the California Code of
6 Regulations may or may not contain it, it would --

7 MS. MANDEL: But it would be then in whatever
8 we publish, like in our law guides where we have the reg
9 we would add --

10 MR. HELLER: Certainly.

11 MS. MANDEL: -- stick it in there as a -- not
12 an official part of the official regulation, but --

13 MR. HELLER: Certainly. It would be
14 information we had a record of from our administrative
15 process as well.

16 So, that the --

17 MS. OLSON: Diane Olson, yes, in submitting the
18 regulations OAL has a format.

19 We actually already produced our own format and
20 we have to change the regulations when we send them to
21 OAL, we put our authority references at the top, they
22 want it at the bottom and they won't accept our he
23 regulation until we change it. So --

24 MS. MANDEL: Yeah, they're pretty particular.

25 MS. OLSON: Yes.

26 MR. HELLER: I mean we'll be -- staff has no
27 problem calling them and finding out specifically and
28 doing something to address this, regardless.

1 Please go ahead, Tom.

2 MR. HUDSON: Tom Hudson.

3 Maybe this is getting a little too petty, but

4 if I read --

5 MR. MICHAELS: Tom Petty.

6 MR. HUDSON: -- seeing the way things are

7 worded here in the subsection (a), you say the Board has

8 to send the acknowledgement letter saying whether or not

9 it's been granted and, if granted, what the location is.

10 You don't really say a date or time,

11 approximate time and --

12 MS. MANDEL: Well --

13 MR. HUDSON: -- that's implied by the fact you

14 granted it?

15 MS. MANDEL: -- I don't know if the

16 acknowledgement letter is the time that Board

17 Proceedings schedules the hearings.

18 MR. EVANS: No.

19 MR. HUDSON: Okay.

20 MS. MANDEL: Do you?

21 MR. HUDSON: You don't say -- you just say a

22 location, you don't say a date?

23 MR. EVANS: The acknowledgement letter

24 indicates that we have got your request for an oral

25 hearing. This is the site we're going to have it.

26 We'll let you know 60 days prior hearing the

27 date and time.

28 MR. HUDSON: I'm glad I asked. I am learning

1 more about this every day.

2 Thank you.

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1 SECTION 5000.5005.2

2 CONSOLIDATION FOR HEARING OR DECISION

3 MR. FOSTER: Unless there is objection, moving
4 on. Page 10, Section 5005.2. Consolidation.

5 MR. MICHAELS: Well, I'm lying in wait here.

6 Peter Michaels speaking, ready to ambush.

7 (e) --

8 MR. HELLER: Okay.

9 MR. MICHAELS: -- seems to have created -- it
10 seems to be fundamentally different from what we've
11 looked at before. If I recall correctly, this seems
12 to -- before, as I recall, the taxpayer had the --
13 the -- the right to -- the word that's used here is
14 "deconsolidate." I'm not sure if that's a word, but,
15 anyway, the taxpayer had the right unilaterally to say,
16 "Look, I don't want the case to deconsolidate and that
17 was -- that was the end of it. It would not be
18 consolidated.

19 And that seems proper to me. Now, instead, it
20 says that the Chief of Proceedings shall submit the
21 objection by a taxpayer to the Board Chair and the Board
22 Chair will apparently have unilateral discretion to
23 deconsolidate or not. If the Board Chair says we're not
24 deconsolidating, if that's a word, that's the end of it.

25 And that's very different from the taxpayer
26 opting out. And I repeat, you're going to have -- at
27 least in the area that I practice most freq --
28 regularly, is -- it's common for there to be issues that

1 taxpayers share, but it's -- it's highly uncommon for
2 there to be a perfect absolute congruence of interests
3 on every issue.

4 And, Lou, you're welcome to take a different
5 view, but --

6 MR. AMBROSE: I -- I agree with everything you
7 said.

8 MR. MICHAELS: You know, you're going to have a
9 lot -- you're going to have power companies or phone
10 companies who have a lot in common, but they've got
11 enough that's not in common for a consolidation to be
12 potentially objectionable.

13 MR. FOSTER: Perhaps we can look at that by tax
14 program, too, because we've had Income Tax cases where
15 you might have 50 people where the facts and issues are
16 exactly identical. You know, you have 50 partners in a
17 partnership --

18 MR. MICHAELS: Yeah.

19 MR. FOSTER: -- and all get some distribution
20 and then the issue is the same for all of them. And if
21 they all demanded to have their own hearing, it would be
22 a nightmare.

23 MR. KAMP: Steve Kamp from Board Member Yee's
24 office. I'm also going to raise with our office the
25 question of whether -- like in Subdivision (d) the Board
26 Chair -- or no Board Member has any role and Subdivision
27 (e) the Board Chair can deconsolidate. How much role
28 the Board Members, Board Chair, BPD, and Chief Counsel

1 should have.

2 So, I'm just going to raise the issue. I'm not
3 saying anything is going to happen, but I'm going to
4 mention it.

5 MR. HELLER: Okay. And just to finish up, I
6 think, Peter, I'll go ahead and note your comment. And
7 I think what you're suggesting is there just
8 be essentially if there is an objection to consolidate
9 received that their -- that the cases not be
10 consolidated.

11 MR. MICHAELS: Well, Ian's point is well taken,
12 too, and, you know, if someone really wanted to wreak
13 havoc, they could collude to have 50 separate cases on
14 the exact same partnership. And I guess that's their
15 right at present.

16 MS. MANDEL: Well, they --

17 MR. MICHAELS: So, it wouldn't be changing
18 anything that's already in -- in existence, is it?

19 MS. MANDEL: And they -- and they -- they may
20 each have their own counsel.

21 MR. MICHAELS: Yeah.

22 MS. MANDEL: I mean, we may be partners in a
23 big partnership and I don't like the guy you hired and
24 you don't like the guy I hired --

25 MR. MICHAELS: Right.

26 MS. MANDEL: And I want my guy to be able to
27 make his pitch equally as you want your guy to --

28 MR. MICHAELS: Exactly, yeah.

1 MS. MANDEL: -- be able to make his pitch.

2 MR. MICHAELS: Yeah.

3 MS. MANDEL: So, you never know.

4 MR. MICHAELS: Right.

5 MR. SHAH: Well, Brad, this is Neil. We had
6 the opposite experience. We had a case that come up, it
7 was a Sales Tax case, and we asked if -- if the Board
8 split up the two cases, although I think one of them was
9 a claim for refund, the other one was an assessment.
10 And we were told that Appeals had wrote -- wrote it up
11 in that manner and couldn't split -- split it up at the
12 hearing.

13 There were two separate representatives. One
14 was an assessment, one was a claim for refund. The
15 claim for refund was a customer of the taxpayer. And we
16 were told, sorry, it can't be done.

17 MR. HELLER: Well --

18 MR. SHAH: In (b) it says the Board Members
19 could -- I guess, may request a consolidation or object
20 to a consolidation, and we did that.

21 MR. HELLER: Okay. Let's see. Well, right now
22 the -- Subdivision (d) does provide that if the Chief
23 Counsel determines that consolidation is inappropriate,
24 the matter won't be consolidated regardless of the
25 parties' consent.

26 But other -- any other standard -- I don't
27 think it's -- I don't know, it really -- I don't think
28 we've focused on an issue of being able to deconsolidate

1 previously consolidated cases.

2 MR. MICHAELS: Well, it got changed.

3 MR. HELLER: The taxpayer --

4 MR. MICHAELS: I mean, it was in there another
5 way before. I mean, I -- I can pull it up. I have it
6 here. It was -- it was written differently.

7 And -- and don't typically, like a -- a black
8 line like this would show where it got crossed out.

9 We probably have on -- somewhere in here
10 what -- what used -- what it used to say, don't we?

11 MR. HELLER: What it used to say would be there
12 if it was -- I mean, it should show redacted.

13 MR. MICHAELS: Well, it should be crossed out
14 somewhere.

15 MR. HELLER: Yeah.

16 MS. MANDEL: Was it in --

17 MR. HELLER: I think he's saying on the
18 Property Tax.

19 MR. HUDSON: I have a question for Ian. This
20 is Tom. Tom Hudson.

21 (Conversation off the record.)

22 MR. HUDSON: We're trying to -- where somebody
23 wanted to deconsolidate, you know, 50 members of a
24 partnership and they wanted to break it up and actually
25 have 50 hearings, has that ever happened in your
26 experience? Is that -- I just wondered if --

27 MR. FOSTER: I don't --

28 MR. HUDSON: -- the whole theory of hearings --

1 MR. FOSTER: I don't specifically --

2 MR. HUDSON: -- If you're going to force them
3 into it if they don't want to be consolidated.

4 MR. FOSTER: I don't specifically remember it
5 happening, but I -- I do know that we have -- I
6 don't -- I specifically remember receiving an objection
7 after it was consolidated, but I do know we have
8 consolidated cases where the parties may or may not from
9 the beginning had wanted to be consolidated.

10 But in order to make better use of the Board's
11 resources we just went ahead and consolidated them.

12 MR. MICHAELS: That's never really been a
13 driver before.

14 MR. FOSTER: In H.R.A. cases it happens a lot,
15 where we get an appeal of 100 people who all live in the
16 same building, and the issue is whether the building was
17 exempt from property tax. There's no point in holding
18 100 hearings on that issue.

19 MR. KOCH: A suggestion. Al Koch. I wonder if
20 this could be worked out only if -- if there is an
21 objection to consolidation if it shouldn't then go to a
22 prehearing conference, and try to work out who is
23 representing whom and, et cetera, et cetera.

24 MR. MICHAELS: Yeah, that --

25 MR. KOCH: And who may have the ability to
26 exercise a right to be separate.

27 MR. MICHAELS: That would work well except in
28 State assessee cases --

1 MR. KOCH: Oh.

2 MR. MICHAELS: -- because those are on, you
3 know, a track -- a statutory track where they have to be
4 decided by December 31st.

5 Do you agree, Marcy -- or Lou? You
6 couldn't -- you couldn't clear this hurdle of
7 consolidation State assesses, I don't think, through a
8 prehearing conference, particularly.

9 MS. MANDEL: No, we -- we had --

10 MR. AMBROSE: I don't know if you could or not,
11 but I agree that it -- it would be -- the time would be
12 pretty tight. You know.

13 MR. MICHAELS: Might work for everybody else.

14 MR. HELLER: Right.

15 MR. AMBROSE: But I mean, typically, we've
16 always consolidated, you know, like your cases or -- you
17 know, Pete Hladik's or whoever's.

18 MR. MICHAELS: Well --

19 MR. AMBROSE: That's pretty common practice.

20 MR. MICHAELS: Well, yeah, I know. I mean,
21 it's -- okay, if there's one owner that has four
22 properties, it makes sense to have all four properties
23 of that one owner --

24 MR. AMBROSE: Right, yeah.

25 MR. MICHAELS: -- heard at the same time.

26 MR. AMBROSE: Yeah.

27 MR. MICHAELS: It's also very common, for
28 example, for two owners of four properties each to have

1 very similar situations. And this would contemplate
2 consolidating all eight.

3 And, you know, what we've done in the past is
4 actually to have two hearings. One for Company A with
5 the four subsidiaries, and the other for Company B.

6 MR. AMBROSE: Yeah.

7 MR. MICHAELS: This would --

8 MS. MANDEL: But even on the --

9 MR. MICHAELS: -- possibly bring it all
10 together.

11 MS. MANDEL: Even on the four subsidiaries, we
12 have -- there was a hearing last year that as soon as I
13 saw it, I was like, "Oh, this is going to be a nightmare
14 to be consolidated together." And -- and it was
15 consolidated together and went forward together and
16 while the hearing was going on it was very confusing
17 because there were so many separate properties, each of
18 which had sort of different issues.

19 And somebody even, you know, said, "Ooh, I
20 didn't realize, maybe this one shouldn't have been
21 consolidated. So, it's kind of -- it's --

22 MR. HELLER: Well, I think staff can -- you
23 know, I think we'll definitely take a look at trying to
24 make -- for one make all of the provisions dealing with
25 consolidation in the various programs as uniform as we
26 can relevant to the programs.

27 And then I guess we'll try to look at how to
28 deal with this. Although, you know, we -- we're leaning

1 away from the idea of trying to have a -- you know, like
2 a true hearing on consolidation just because --

3 MR. MICHAELS: Well --

4 MR. HELLER: -- of the resources and everything
5 on that. So --

6 MR. MICHAELS: Yes, I know.

7 MR. HELLER: But to the extent there is an
8 objection that needs to be decided we will see what we
9 can do.

10 MR. MICHAELS: Could you maybe put something in
11 that -- I'm thinking out loud, so this may not even
12 sound very good once it comes out, but could you put
13 something in maybe that says that, you know, the -- you
14 know, the Chair or the Chief of Proceedings, you know,
15 can make a judgment about consolidation if it appears
16 the request is frivolous or some such?

17 Because that would be your example there where
18 people are just trying to play games as opposed to some
19 legitimate thing where there are two different lawyers
20 or there's trade secrets or who knows what that, you
21 know, is not frivolous.

22 MR. HELLER: Okay.

23 MR. HUDSON: That's a good word to use because
24 there's kind of an existing standard on, you know, that.

25 MR. LO FASO: Frivolity.

26 MR. HELLER: Frivolity, yes.

27 MR. DAVIS: Although (f) -- Ken Davis. (f)
28 provides the standard for consolidation.

1 And it's -- request for written -- "A request
2 for consolidation should establish the relevant facts
3 and issues to be heard before the Board." Let's see --

4 MR. MICHAELS: What page are you on, Ken?

5 MR. DAVIS: It's on -- on 10.

6 MR. MICHAELS: Okay, thank you.

7 MR. DAVIS: And, actually, we're reques --
8 we're suggesting that this paragraph (f) go up into (b)
9 because it relates to what -- what a request is all
10 about.

11 But it's to establish the rele -- that the
12 relevant facts and issues to be heard before the Board
13 are similar in each matter and no right of any party is
14 prejudiced.

15 MR. MICHAELS: Right. Well, that --

16 MR. DAVIS: It doesn't hit your frivolity
17 issue.

18 MR. MICHAELS: But it also -- there's an awful
19 lot of sort of room for mischief there, and no right of
20 any party is prejudiced by the consolidation.

21 Well, just -- if it's up to the Chair, and the
22 Chair has said, "Balderdash, we're not to close the
23 session to the public, I don't care if they're" -- I
24 mean, and no -- it's going to be then a basically
25 subjective unilateral judgment by one person that no
26 right's prejudiced. And reasonable people could differ
27 about that.

28 MR. DAVIS: And -- and it looks like in (c),

1 though, a party has a right to object to the
2 consolidation at the first instance.

3 MR. MICHAELS: Right. But that --

4 MR. DAVIS: And then they get a second chance
5 at it after -- after there's a resolvable.

6 MR. MICHAELS: Where's the second chance?

7 MR. DAVIS: Well, if you go to the -- the (b)
8 is a request. Any party may request.

9 MR. MICHAELS: Yeah.

10 MR. DAVIS: And then if I'm -- if I'm reading
11 it right, then (c) is, "Requests for and objections to
12 consolidation" --

13 MR. MICHAELS: Right.

14 MR. DAVIS: -- must be submitted to the Board
15 Proceedings. So --

16 MR. MICHAELS: And then (d), --

17 MR. DAVIS: (d) is --

18 MR. MICHAELS: -- here's what happens when you
19 do that.

20 MR. DAVIS: No, here's -- I think (d) is -- oh,
21 yeah, so you've got a request and then you've got
22 objections and then you got determination by the Chief
23 Counsel.

24 MR. MICHAELS: Right. One way or the other.

25 MR. DAVIS: One way or the other. And then
26 afterwards then you've got the -- another objection and
27 request --

28 MR. MICHAELS: Right

1 MR. DAVIS: -- a truly request to
2 deconsolidate.

3 MR. MICHAELS: You're correct. So, there's a
4 second bite there, but that under this the Board Chair
5 has the unilateral authority to do whatever the --

6 MR. DAVIS: Yes. I mean, I --

7 MR. MICHAELS: -- Chair wants.

8 MR. DAVIS: -- don't disagree.

9 MS. MANDEL: That's what it says.

10 MR. HELLER: And I think the only benefit --
11 you know, the additional benefit there is you're getting
12 the Chief Counsel and the Board Chair's determinations
13 as opposed to just the single person, as you were
14 saying, just one person who may have a different opinion
15 than you.

16 MR. MICHAELS: Well, again, I mean it used to
17 say "if the taxpayer objects", and I guess I'm
18 suggesting that if the taxpayer's objection is
19 not frivolous or, you know, gamesmanship, that --
20 that --

21 MR. HELLER: So I --

22 MR. MICHAELS: I guess it's still, for me,
23 not -- you know, the fact that there -- there is a
24 second person, there's a Chief of Proceedings and the
25 Chair, two heads, you know, balance -- yeah, that's good
26 and all, but it's still worse than it was before.

27 MR. HELLER: Right. And so, let me just ask a
28 quick question.

1 But, Peter, you -- you would prefer something
2 that really said an objection, we would deconsolidate if
3 there was an objection to consolidation, or whatever the
4 appropriate term for consolidation.

5 MR. FOSTER: So long as the objection was not
6 frivolous.

7 MR. MICHAELS: Yeah. I mean, I'm fine with all
8 the belts and suspenders --

9 MR. HELLER: All right. Okay.

10 MR. MICHAELS: -- there or some demonstration
11 of why there -- it should not be consolidated.

12 MR. HELLER: Okay.

13 MR. MICHAELS: I'm fine about having to
14 demonstrate that. I'm all for efficiency.

15 MR. HELLER: Okay, well, I think we -- maybe if
16 we -- as a suggestion, maybe something that says -- I'm
17 just trying to flush out the frivolous idea, and so,
18 something that says we received -- we received an
19 objection stating the information that we're saying --
20 saying why -- why a right of some parties is prejudiced
21 and that -- that the explanation is not frivolous, then
22 it will be granted. Something to that effect.

23 MR. MICHAELS: Yeah, that's --

24 MR. HELLER: So that it's really putting forth
25 some burden on the person who wants to not be
26 consolidated. But giving us a slight standard, but --
27 but at the same time putting -- basically not being in
28 favor of granting that kind of objection where it does

1 arise.

2 MS. MANDEL: Yeah.

3 MR. HELLER: If that makes sense.

4 MS. MANDEL: Then you have that frivolous

5 standard of -- whatever it is -- purpose of delaying --

6 MR. HELLER: Yeah.

7 MS. MANDEL: Yes, there's some magic thing

8 about --

9 MR. MICHAELS: Embarrassment -- what was it, --

10 MS. MANDEL: No, no, not that one.

11 MR. MICHAELS: -- annoyance.

12 MR. HUDSON: I'm just curious, would it ever be

13 considered frivolous if somebody had -- was represented

14 by a different counsel? Is that the kind of thing we

15 could flush out and say it's not frivolous if you have

16 different counsel and the reason you don't want to

17 consolidate is because you want to present a different

18 case?

19 MS. MANDEL: Well --

20 MR. MICHAELS: You mean, there's a presumption

21 that if there are two different lawyers --

22 MR. HUDSON: Yeah, presumption if you're

23 obtaining a different lawyer that -- that it's not

24 frivolous.

25 MR. HELLER: Well, I think -- just quickly, I

26 mean my feeling would be assuming that you can state

27 that, then you -- you would meet the standard I was just

28 kind of trying to express, and I don't think we --

1 assuming staff goes along those lines, as soon as you
2 point out that you can't present your case in the manner
3 you want to and you're not going to be able to -- to do
4 your presentation at the hearing, I think that would
5 meet the -- like any, you know, interest of a party as
6 being prejudiced by consolidation. And that that ground
7 stated isn't frivolous.

8 So -- so, I think we would be able to cover the
9 situation you're talking about but, you know, we could
10 go through and try to be very specific. But I think
11 it's kind of a dangerous activity to go down of, well,
12 we said that if your -- your attorney wants to change it
13 to this extent, that's grounds. But what if your
14 attorney really just wants to argue with the other
15 attorney about some point of law, is that enough? We
16 didn't express that.

17 I think we might be better off having -- if we
18 could find something that's acceptable to everybody
19 that's more general that we can use in application, I'd
20 recommend staff trying to do that first and making it so
21 that it covers all the scenarios that we're concerned
22 with.

23 MR. HUDSON: And the -- the other thing I hope
24 is a consideration -- this is where I'm showing my
25 ignorance again, but to the extent that we don't have a
26 history of the kind of problem that Ian was talking
27 about, where we have that kind of gamesmanship going on,
28 maybe the simplest rule is just if you don't want to be

1 consolidated we're not going to consolidate you.

2 And that's -- that's a simple, easy to apply
3 rule. Maybe we should start at the simple rule and
4 then -- then, you know, maybe we could complicate it
5 only to the extent we need to for some kind of
6 gamesmanship that's actually going on.

7 MR. HELLER: I think that's a great comment,
8 actually.

9 And I think that would -- might make other
10 people happy, as well, and make things consistent
11 between programs.

12 So, we'll definitely look at that and try to
13 come up with the -- the most -- the simplest solution
14 that -- that satisfies all of our concerns.

15 We'll definitely need more work on the section.

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SECTION 5000.5006

NOTICE OF BOARD HEARING AND RESPONSE

MR. FOSTER: Very well. Page 11. Section 5006. Notice of Board Hearing and Response.

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SECTION 5000.5007

DISMISSAL, DEFERRAL AND POSTPONEMENT OF HEARING

MR. FOSTER: Page 13. Section 5007. Dismissal, Deferral and Postponement.

MR. MICHAELS: So, this -- I'm just trying to put the commas here. Under 5007 I sort of connect the commas here. Dismissal, deferral and postponement of hearings. Would that be a dismissal of a hearing?

MS. MANDEL: Dismissal of a case. Dismiss a matter, under (a).

But -- but Peter is giving you a grammar thing in your heading.

MR. HELLER: So, deleting the word "of hearing" probably?

MR. LO FASO: I'm sorry. The question is whether "of hearing" modifies only postponement and deferral, but not dismissal? Is that the question?

MR. FOSTER: I think so.

MR. HELLER: I think, yes.

MS. MANDEL: And of course down in (b) you're talking about briefing as well as hearing. So, --

MR. MICHAELS: And are the word -- is the word -- earlier or elsewhere the words "acceptance" or

1 "accepting" and "rejecting" are used, here we're using
2 "dismissal" -- are those synonymous --

3 MR. HELLER: Either --

4 MR. MICHAELS: -- rejecting and dismissing?

5 MR. HELLER: And -- thank you for asking that
6 question, Peter. But essentially the accepting and
7 rejecting petitions and appeals language is not in this
8 part at all. That language is contained in Parts 3 and
9 4 and has to do with Property Tax petitions and also
10 appeals from the Franchise Tax Board.

11 And those provisions are very specific to those
12 programs. One, because the Board has to establish
13 jurisdiction over appeals from the Franchise Tax Board.

14 And so, the -- the process of accepting that
15 appeal has greater importance there in other programs.
16 And for Property Tax purposes there's essentially time
17 constraints that deal with whether we're accepting or
18 rejecting and we need to do that very quickly in order
19 to get the process moving forward.

20 So, that's discussed in those two different
21 parts dealing with those topics.

22 Here we're talking about something where
23 there -- a petition, a claim, appeal, has long been --
24 has been accepted long before this point in the process.

25 So, there's no exception or rejection.

26 Here we're dealing with something where --
27 where the -- the matter that's going before the Board
28 could be dismissed or the hearing or briefing could be

1 deferred or postponed, was what this was intended to do.
2 And I think the change to the -- the title to make it
3 clear that it's not just about hearings would make --
4 would help, as well. But it's essentially taking --
5 dealing with later on in the process.

6 And then also for those of you who are
7 interested as far as Business Taxes matters are
8 concerned, we didn't include any language about
9 accepting and rejecting petitions and appeals in that
10 context, because the Board has quite a bit more latitude
11 to treat things as administrative protests. And we've
12 really used that function as opposed to saying we're
13 going to reject your pro -- your petition and we're
14 going to treat it as something else, is what we're going
15 to do instead.

16 So, that's the reason why that language isn't
17 there in case anyone is concerned. But -- but that
18 would be why we have what we do in Section 5007.

19 MR. MICHAELS: Excellent.

20 MR. EVANS: If we could go back to 5006 for a
21 second.

22 MR. FOSTER: You bet, Gary.

23 MR. EVANS: In the (d), Waiver of Notice, the
24 second sentence says if the 60-day notice period is
25 waived, a modified briefing schedule. Would the 45-day
26 notice period, as well?

27 Or do you want to do the same thing?

28 MR. HELLER: In (d).

1 MS. MANDEL: (d), on page 12.

2 MR. EVANS: Page 12.

3 MR. FOSTER: It's because the first -- the
4 first sentence has both periods and second sentence just
5 references one.

6 MR. HELLER: I think we would want to modify
7 the briefing schedule for both. So, 60-day and/or -- or
8 45.

9 MS. MANDEL: Well, would the 45-day -- is there
10 briefing in those matters after the 45-day notice?
11 Maybe that's why you don't have it. Maybe those ones
12 are all --

13 MR. HELLER: Peter, you'd know better than me,
14 but I think -- aren't they tied to the hearing date, the
15 briefing schedule still?

16 MR. KOCH: Isn't briefing completed by that
17 time? At least in the 60 days.

18 MR. HELLER: I don't think so.

19 MR. EVANS: Usually.

20 MR. KOCH: Usually.

21 MR. AMBROSE: Not -- not for a State assessee,
22 though.

23 MS. MANDEL: Okay. Okay.

24 MR. HELLER: So, it wouldn't hurt to have the
25 authority to be able to modify it.

26 MS. MANDEL: Yeah, if there is a briefing
27 schedule.

28 MR. HELLER: Okay. Yeah, it just says "any

1 briefing schedule as appropriate." So, it's not
2 requiring any specific modification.

3 MS. MANDEL: Right.

4 MR. HELLER: So, thank you, Gary.

5 MR. FOSTER: Anything else on 5006 or 5007?

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1 SECTION 5000.5008

2 REPRESENTATION AT HEARINGS

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4 MR. FOSTER: Page 16, 5008, Representation.

5 MR. HELLER: I would like to point out here
6 quickly we did add some language in subdivision (d) that
7 was recommended by the Franchise Tax Board, that would
8 prohibit somebody who's disbarred from practicing before
9 the Franchise Tax Board from representing an Appellant
10 from the Franchise Tax Board before the Board, which we
11 thought was very good of them and appropriate to point
12 out.

13 The rest of the changes, I think, were very
14 minor and dealt with the authorized representative.

15 MR. EVANS: In section (a), it says that the
16 authorized person must be at least 18.

17 MR. HELLER: Yes.

18 MR. EVANS: So, if a taxpayer has their --

19 MS. MANDEL: Child speaking for them? Or are
20 they even allowed to do that?

21 You know, comes in and the parents can't speak
22 well enough --

23 MR. EVANS: Can't speak very well.

24 MR. MICHAELS: You're talking about someone
25 who's under 18 that's speaking for the parents?

26 MS. MANDEL: Yeah.

27 MR. EVANS: Correct.

28 MR. LANGSTON: They would be representing.

1 This comes from your regular old power of
2 attorney requirement that a person to represent another
3 must be an adult or capable of representing another.

4 That's -- that's where the 18 comes from, I
5 think.

6 MS. SIMPSON: Exactly.

7 MR. HELLER: We do have provisions also to
8 provide any of these people with an interpreter through
9 the Board as well.

10 So, to the extent it became a problem, we could
11 still reschedule a hearing and provide an interpreter
12 for somebody who couldn't provide a family member who
13 was of majority age.

14 MS. MANDEL: What he's saying is that that
15 family member would --

16 MR. LANGSTON: They wouldn't be the
17 representative. They wouldn't be -- if someone's
18 interpreting, it's still the person speaking in the
19 foreign language that is, you know --

20 MR. HELLER: Correct.

21 MR. LANGSTON: -- making the testimony.

22 The interpreter is not, hopefully, representing
23 them. They're just translating

24 MR. HELLER: Right, absolutely.

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1 SECTION 5000.5009

2 POWER OF ATTORNEY

3 ---o0o---

4 MR. FOSTER: Section 5009, power of attorney.

5 MR. HELLER: And this one I would point out --
6 Section 5009, staff added some language at the end of
7 subdivision (c) that was requested by Abe Golomb dealing
8 with the ability to accept a substitute power of
9 attorney.

10 And it essentially does provide staff with the
11 discretion to accept one. It still requires all of the
12 same terms.

13 But I believe there have been a few cases where
14 a particular staff member just didn't like that it
15 wasn't on our form and we're trying to alleviate that
16 kind of conflict.

17 MR. MICHAELS: That will work.

18 MR. HELLER: It's a try.

19 MR. FOSTER: If there's an IRS form submits?

20 MR. HELLER: That would be correct, we could
21 accept an IRS form that contained the same information
22 that is being requested here or that's included on our
23 form or just a form that was drafted by an attorney or
24 other representative with the power of attorney.

25 As long as it has the same provisions.

26 MR. LANGSTON: Or a general power of attorney
27 for a person who is incapacitated or in the hospital or
28 something, that's also -- we see that sometimes.

1 MR. HELLER: Yes.

2 MR. HUDSON: Tom Hudson. Wait a minute, you

3 brought up a great point.

4 I don't see here where a general power of

5 attorney would work.

6 MR. LANGSTON: Well --

7 MS. MANDEL: Under (c),

8 "Any written document containing all of the

9 provisions."

10 MR. HUDSON: Yeah, all of the provisions,

11 that's the whole point.

12 MS. MANDEL: Oh, that includes tax -- the tax

13 matters.

14 Then I guess you would say, well, if it's a

15 general one, it generally covers everything under the

16 sun.

17 MR. HUDSON: But it doesn't -- but a general

18 power of attorney would never mention some of the things

19 on here that we're mentioning, like, you know, account

20 numbers and things like that.

21 MR. LANGSTON: Well, that's a good point.

22 MR. LO FASO: I mean what --

23 MR. HUDSON: I've seen the space on the general

24 power of attorney forms that ask for taxpayer ID number

25 or Social Security number, but I haven't seen a space on

26 there where it says, well, "We want the account number,"

27 and some of these other things we're asking for --

28 telephone number.

1 MR. LANGSTON: What sometimes happens is, say a
2 taxpayer in the hospital will have a son or daughter who
3 has a general power of attorney, they will sign the tax
4 power of attorney appointing someone else.

5 I suppose they could appoint themselves with
6 all of that information. The -- the tax year and
7 taxpayer information is primarily to verify that they
8 are actually representing them for that year, you know,
9 and they're the right person and all that.

10 I'm not sure that goes to the legal effect of
11 the power of attorney as much as sort of the clerical
12 recordkeeping, making sure that they're representing
13 them for this particular matter as opposed to some other
14 matter.

15 But, isn't there -- I think there is a general
16 out clause anyway that you don't really need a power of
17 attorney at all and it's only if there is a question
18 they're going to ask for these.

19 Isn't that still in the --

20 MR. HUDSON: That's not what this says, it
21 says, "May require."

22 MR. HELLER: It said may require.

23 MR. LANGSTON: "May require," because, I mean,
24 it's unusual that they actually do require it.

25 MR. HELLER: Generally -- our general practice
26 is that, you know, normally a representative is very
27 clear who he is representing who in most cases, it's
28 just situations where we're contacted out of the blue by

1 somebody who says, "You know what, I'm representing this
2 business. I want to see their file."

3 That would be a great example where we would
4 say, "Well, please go ahead and send us our form power
5 of attorney so we're clear that this person has actually
6 signed something saying you're allowed to look at it."

7 And then also -- expanding on what Bruce was
8 saying -- also we do request the tax periods be
9 identified because taxpayers often do have
10 representatives representing them for different periods
11 on different matters, especially, I think -- and I'm not
12 an expert on this -- but I think with some of the
13 Corporate Governance rules that are out there, a lot of
14 big companies have different people -- different
15 entities handling their compliance, like return filing
16 requirements as opposed to handling their controversy
17 work, and so, we need to know who is who and which ones
18 are allowed to see what from which periods.

19 Those are reasons we're requesting it,
20 although, I think, you know, there -- I would tend to
21 think we would still accept the general form power of
22 attorney or we would be able to let that person sign
23 something else.

24 MR. LANGSTON: The Chief Counsel could make
25 that determination under the new rules.

26 MR. HUDSON: But here's to make it painfully
27 obvious, you know, the only problem here with
28 subsection (c) is the word, "All," it says, "All of the

1 provisions required by subdivision (b)."

2 That is the one word that is the problem here.
3 Can't they just say, "Containing substantially," you
4 know kind of the substantial compliance concept?

5 You know, if they have everything but the fax
6 number, the telephone number, account number or
7 something, isn't that fine?

8 MR. LANGSTON: Really, (c) is two separate
9 things.

10 The is first sentence of (c) is saying you can
11 use a different form.

12 The second sentence should really be its own
13 subsection, which is the general out clause. That would
14 also solve the problem by saying, "If an issue arises,"
15 that, you know, if they don't have one of these forms
16 then that -- I think that would also solve the problem.

17 MR. HUDSON: We have, you know, the standard
18 form, I'm trying to remember the last time I saw one, I
19 think I saw it actually printed in -- where is it in the
20 State law?

21 It was more than a decade that I last looked it
22 up, but there is actually a statutory form for power of
23 attorney that doesn't contain these things, and, oh, my
24 gosh, if somebody used the statutory form it seems like
25 they should be covered.

26 MR. LO FASO: But alternatively, in sentence 1
27 it is what does the staff have to accept.

28 And sentence 2 is if the staff accepts, then

1 there is the question of what the Chief Counsel decides.

2 If there was a lack of a permit number,
3 couldn't the say, "Could you write your permit number on
4 the top of that and then I can give it to Chief
5 Counsel"?

6 MR. HUDSON: It's got to be notarized by the
7 that filled it out.

8 I don't think you can just add things to a
9 power of attorney form without the --

10 MR. HELLER: Our form powers of attorney don't
11 require notarization.

12 MR. LANGSTON: No, they don't.

13 MR. HELLER: The Board's do, but I think the
14 statutory form might, I'm not positive.

15 MR. HUDSON: It implies it. It's prominently
16 on there the last time I saw it, but --

17 MR. MICHAELS: Also I agree with Tom that
18 there is sort of a -- there is sort of a common sense
19 everyday linkage between a power of attorney and having
20 it notarized, whether it's necessary or not.

21 MR. LANGSTON: We never have ours notarized.
22 We dropped that like 15 years ago.

23 MR. HELLER: How about -- oh, I'm sorry.

24 MR. LANGSTON: I'm just saying we don't as a
25 practice any more because it's the representative that
26 gives us the power of attorney, not the taxpayer and it
27 was burdensome.

28 MR. MICHAELS: It's different over here then.

1 MR. HELLER: But, any way, I do think we can a
2 change the -- I don't see any reason why we couldn't
3 change subdivision (c) to refer to a written document,
4 including a general power of attorney, or I should say a
5 statutory general power of attorney --

6 MR. HUDSON: Yeah.

7 MR. HELLER: -- let's say, containing
8 substantially all of the provisions and then still have
9 Chief Counsel make a decision if there's any kind of
10 dispute that arises, even regarding like the specifics
11 of what -- what hearings you are entitled to.

12 MR. LANGSTON: I have no problem with that.

13 MR. HELLER: That way we can bring in people
14 who just, for instance, are like the representative of
15 the incapacitated individual.

16 MR. HUDSON: Yeah, the grandma's in the
17 hospital kind of thing.

18 MR. LANGSTON: Or if they leave one of the
19 fields blank and you're ready to go, and, you know, it's
20 no fax number.

21 MR. FOSTER: FTB is not going to challenge our
22 jurisdiction for lack of a fax number?

23 MR. LANGSTON: Exactly.

24 MR. FOSTER: You said that on the record,
25 Bruce.

26 MR. LO FASO: Could you notarize that, please?

27 ---o0o---

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SECTION 5000.5010

CONTRIBUTION DISCLOSURE FORMS

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MR. FOSTER: We'll keep going for another ten minutes or so and then take a break.

So turn to page 18, Section 5010?

Section 5011?

MS. MANDEL: Actually on this 5010, just a cross reference of -- you have defined the Board -- you have defined Board Member to include the Deputy State controller and the Kopp Act stuff is -- I'm not sure that it's matching.

MR. KAMP: Also --

MS. MANDEL: And all the Kopp Act forms just name the five Board Members.

I suppose if you had a Deputy State Controller who was actually running for office, it would be an odd thing, but I don't even know that that is technically under the Kopp Act.

You might want to just check your references on that -- on how that all fits together.

MR. KAMP: Steve Kamp from Board Member Yee's office.

I also think that the Kopp Act does -- does not refer to contributions to the Board Member, but committees controlled by the Board Member.

Because that's how you have to intermediate contributions under the Political Reform Act.

1 The elected candidate never takes them
2 directly, it goes to the committee that the candidate
3 controls.

4 You may want to check that out.

5 MR. MICHAELS: What do you want changed?

6 MR. KAMP: It just like it says here, "every
7 contribution to Board Members."

8 MR. HUDSON: Yeah.

9 MR. KAMP: That's personal use, almost you are
10 saying.

11 That never happens. It's to a committee that
12 the Board Member controls

13 MS. MANDEL: I don't know what our forms say
14 that was sent out, but we just have to watch and clean
15 all that up.

16 MR. HELLER: I will go ahead and do that,
17 Steve.

18 I do think, though, we were hoping -- we did
19 make that change in subdivision (d) to bring in the Kopp
20 Act itself.

21 So, we're saying that those -- those
22 definitions are going to apply to this section.

23 MS. MANDEL: Okay. So, that might take care of
24 it.

25 MR. HELLER: But to the extent we create an
26 inconsistency, we need to go check, make sure of that.

27 So, I'll do that. And I will check to make
28 sure that the use of the term Board Members, as defined

1 in this part, doesn't conflict with the Kopp Act's
2 treatment of a Deputy Controller who might be defined as
3 a Board Member --

4 MR. KAMP: Yeah.

5 MR. HELLER: -- under this part.

6 MR. FOSTER: Anything else on that section?

7 ---o0o---

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1 SECTION 5000.5011

2 HEARING SUMMARY

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4 MR. FOSTER: Section 5011, hearing summaries.

5 MR. MICHAELS: An objective.

6 MR. FOSTER: Yeah.

7 MR. HELLER: We received a comment from Mr. Al
8 Koch suggesting that hearing summaries be objective,
9 which I believe has always been our policy, but maybe
10 something that wasn't always carried through.

11 And staff did insert the word "objective." I
12 think it's, you know, try to define the term objective.

13 MR. MICHAELS: Good.

14 MR. HELLER: But --

15 MS. MANDEL: What they've done --

16 MR. MICHAELS: You couldn't.

17 MR. HELLER: We're trying to send the message
18 to, you know, the conference holders and staff and the
19 Appeals Division that the Board needs to hear both sides
20 clearly. And they need to clearly state the taxpayer
21 petitioner's argument clearly and also identify whatever
22 relevant evidence has been entered in objective fashion.
23 So, we really have no problem adding that.

24 MS. MANDEL: We did not want to go there.

25 MR. AMBROSE: I had a comment. This is Lou
26 Ambrose.

27 If the proposed changes to the property tax
28 appeals rules, you know, are going to take effect,

1 there's going to have to be an exception carved out for
2 those too because, obviously, if you -- the hearing
3 summary is going to be prepared after the appeals
4 conference, which is 30 days prior to the hearing or,
5 you know, no later than.

6 So --

7 MR. MICHAELS: Don't the rules in that section
8 trump the -- this, expressly trump it?

9 MR. AMBROSE: Well, that's what I thought, but
10 then I saw this exception here at (c), so --

11 MR. MICHAELS: (c)?

12 MR. LO FASO: The user friendly cross
13 references are appropriate.

14 MR. FOSTER: Chapter 4 says that it trumps
15 Chapter 5 where there is a conflict, but we've still
16 gone through Chapter 5 and made that clear everywhere
17 there is a conflict to refer people to Chapter 4.

18 MR. HELLER: We can -- we will definitely -- as
19 of -- the property tax provisions have kind of been in
20 flux recently and how the final stages in the process
21 are going to look is still not 100 percent clear to me.

22 When it is clear, we will definitely make sure
23 that either of the provisions -- well, what we'll do is
24 several things, make sure that the provisions in Part 4
25 are clear, and Part 3, which deals with property tax,
26 are clear, and explain what is actually going to happen.

27 Then I think we'll go ahead -- to the extent
28 that they're different from what the general rule is in

1 subdivision (a) here and we will create a subdivision, I
2 guess (e) now or renumber (c) and (d) so that there is a
3 cross reference for property tax appellants to know
4 which procedures apply to them.

5 And that's -- there may, in fact, be more than
6 one procedure in the property tax now for different
7 programs within property tax.

8 So, that's something we'll have to deal with.
9 It wasn't -- I don't believe any information was
10 available when I was working on this -- it's not for
11 sure.

12 But that was the -- there was no intention of
13 trying to create a conflict and to the extent there is
14 one, definitely want to want to get it out before
15 presenting it to the Board Members -- definitely try to
16 do that.

17 MR. KOCH: Question?

18 I don't remember what's different in Chapter 4
19 on the hearing summary.

20 MR. FOSTER: Chapter 4 describes the hearing
21 summaries prepared after the Appeals Division has
22 reviewed the file, requested additional briefing, and,
23 if it needs to, held the prehearing conference, if it
24 needs to, as opposed to here, subdivision (a) of 5011
25 sets a deadline, but in --

26 MR. KOCH: Okay.

27 MR. FOSTER: -- Chapter 4 you have a different
28 sequence of events.

1 MR. KOCH: Okay. Now, let's suppose that the
2 hearing summary is sent out 40 days before.

3 And the taxpayer believes it's either not
4 objective or not complete. What happens after that?

5 MR. MICHAELS: Maybe you should add, "fair and
6 balanced"?

7 MS. MANDEL: No, no, we had that conversation.

8 MR. KOCH: Don't go too far.

9 MS. MANDEL: That's a pejorative term.

10 MR. HELLER: We did provide language in that
11 second sentence of subdivision (a) allowing that the
12 taxpayer submit information to to the Chief of Board
13 Proceedings.

14 MR. KOCH: Yes, I understand.

15 MR. HELLER: But as far as -- we did not
16 explain how that would work as far as many -- currently
17 it's really within the discretion of the Appeals
18 Division to determine whether or not their hearing
19 summary, one, is objective, and whether it accurately
20 conveys the information, especially in the case where
21 there's an objection from one of the parties.

22 And my experience is that they generally just
23 made the change. I don't -- there's has been very few
24 cases where they want to get into a factual dispute.

25 MR. MICHAELS: It's usually a typo.

26 MR. HELLER: In most cases, or there's even
27 cases where there was just a misunderstanding of the
28 conference holder, who, you know, otherwise wrote a --

1 you know, some letter in the file that was already
2 clarified to the auditor that didn't mean what the
3 auditor originally said.

4 But they're still looking at some other
5 documentation, carrying that forward. That's been
6 incorporated to the Appeals -- or I should say hearing
7 summaries, occasionally that has been taken out.

8 But we could flesh out those procedures but we
9 really felt that that was an area where common sense
10 would probably play a role. And since we're making
11 them -- requiring them to be objective, I don't believe
12 that the Appeals would want something that didn't appear
13 to be objective on its face to go to the Board Members
14 after having received notice that there was something
15 incorrect and choosing not to incorporate that extra
16 information.

17 So, that's our feeling for now. So, we're not
18 planning on adding any procedures, but we'll definitely
19 keep it mind and we may need to in the future if we do
20 have lot of issues.

21 Although we are hoping our hearing summaries
22 will be better in the future. And that's been part of
23 this whole process was trying to get all of the briefing
24 done and giving our Appeals Division staff the ability
25 to get additional information before preparing their
26 hearing summaries.

27 So that, hopefully, the quality of the
28 summaries, the quality of the information presented to

1 Board Members will increase over time and there will be
2 less confusion -- at least that's our hope

3 MR. KOCH: Well, at least the experience that
4 we've had is that Board Proceedings is really looking to
5 Legal.

6 And Legal is our opponent. And so sometimes it
7 doesn't come out objective. And so maybe that won't be
8 true any longer, right?

9 MR. HELLER: I think that staff is hoping that
10 by adding the word "objective," that it would be
11 addressing that issue to some degree.

12 MR. KOCH: I understand and appreciate it very
13 much.

14 MR. HELLER: As far as, though, the procedures,
15 right now, the way that the Board's currently set up,
16 the Board Proceedings Division is a part of the Legal
17 Department.

18 So, the Board Proceedings and the Appeals
19 Division both report to Chief Counsel. And so, to the
20 extent that there was some sort of dispute it would be
21 the Chief Counsel who would mediate on that, but --

22 MR. KOCH: I understand.

23 MR. HELLER: To extent that they're all kind of
24 a part of the same group, that's absolutely true,
25 they're all part of the of Legal Department.

26 I can understand some -- a lack of comfort with
27 the procedure, but it's what we have right now.

28 MR. EVANS: When it says that, "The Board

1 Proceedings shall mail," does that include e-mail or any
2 other kind of electronic --

3 MR. HELLER: "Shall mail"?

4 I don't believe we have not intended that to
5 that include electronic mailing at this time.

6 MR. KOCH: It's an otherwise provision of it if
7 you are e-mailed?

8 MR. HELLER: For us -- at this point, as far as
9 communications going from Board Proceedings to the
10 taxpayer and other parties as far as scheduling the
11 hearing itself, we haven't incorporated any -- any
12 regulations allowing for any e-transmissions
13 specifically.

14 I think taxpayers can certainly, you know,
15 enter into agreements to accept notice any way they want
16 to, but, I think -- right now, our biggest concern is --
17 this is really my concern, as one of the few people who
18 have looked at the issue so far, but it's really
19 there -- we would prefer to make sure that -- that we
20 have a hard copy that we can prove that it was mailed,
21 that it was sent to the taxpayer at the correct address
22 if we're going to hold their hearing and right now I
23 don't know that there is a comfort level with e-mailing
24 these types of information to the extent where a
25 taxpayer could say, "Well, my e-mail service was down.
26 I never got that. I don't know what that is."

27 MR. HUDSON: Isn't this whole thing moot as it
28 says, "Or otherwise provided"?

1 Is that what your're talking about?

2 MR. LO FASO: Yes.

3 MR. HUDSON: So, already under existing
4 language you've got there it could be e-mailed and
5 that's fine.

6 MR. HELLER: I think so. But I mean -- yes,
7 "otherwise provided," I'm still trying to indicate it
8 wasn't intended to create a big e-mailing.

9 MS. MANDEL: That's for --

10 MR. HELLER: You're correct.

11 MR. KOCH: It should be both, really. If it's
12 e-mailed then they could -- would confirm with a letter.

13 MS. MANDEL: And I only see, "or otherwise
14 provided," in the modifications to a hearing summary,
15 not that the actual hearing summary itself is mailed.

16 MR. HUDSON: Good point.

17 MR. HELLER: That was dealt with because
18 modifications can happen -- literally be finished the
19 day of the hearing. We have had that situation.

20 And so in that case we wouldn't have to want to
21 mail it to the taxpayer while they're there and won't
22 get it for five more days and their hearing's that
23 morning.

24 That was, I think, really what we were thinking
25 of, not to create this expanded methods for transmitting
26 information. We really are concerned that Board
27 Proceedings maintain the paper trail of all its
28 communications.

1 MR. KOCH: Now you're really bothering me.
2 You're saying that you can amend the summary of
3 the hearing the day of the hearing?
4 MR. HELLER: Essentially.
5 MS. MANDEL: Sometimes they correct them, it
6 happens.
7 MR. MICHAELS: Typos, it happens.
8 MR. KOCH: Typos I have no problem with.
9 But rewriting --
10 MS. MANDEL: Usually, it's typos.
11 MR. KOCH: -- I mean if you submit a
12 modification request, it comes back, it's modified?
13 MR. FOSTER: Sometimes the Appeals Division
14 will.
15 MR. KOCH: Is that the end of it? Or can it
16 get modified again?
17 MR. MICHAELS: Are you saying -- Al, are you
18 saying --
19 MR. KOCH: I am only -- I'm only talking from
20 experience.
21 MR. MICHAELS: But are you saying you asked
22 for -- you are saying, "Hey, this isn't objective, this
23 is subjective, I'd like it modified."
24 Is that what you are presenting?
25 MR. KOCH: Yeah.
26 MR. MICHAELS: Okay. So, they say, "You are
27 right, it is subjective, it's not objective."
28 Then that's your scenario? Then you see the

1 objective version the day of the hearing?

2 MR. KOCH: Or you don't see it until the day of
3 the hearing.

4 MR. MICHAELS: Well, if it's objective, I guess
5 it's no harm.

6 MR. KOCH: I don't know whether to correct it
7 or not.

8 MR. MICHAELS: It's been repaired.

9 MR. HUDSON: Okay. I don't know if we need to
10 have the discussion now, but as long as we've gotten
11 into this, why don't we just say in the first sentence,
12 "Shall mail or otherwise provide the taxpayer and the
13 Department," and like that?

14 So, we put "or otherwise provide," in the
15 first sentence too? That way if somebody wants, you
16 know, hand delivery, they come to the counter and say,
17 "I'd like to get it. I'm here."

18 Or you can e-mail it to them.

19 MR. HELLER: I would still suggest that that's
20 not really -- well, it's something we can consider, but
21 I think -- my biggest concern here is when you hand
22 something to someone, you don't have the record of
23 mailing it that we -- that I am interested in.

24 MS. MANDEL: Tom?

25 MR. HUDSON: If you're interested in creating a
26 record, then e-mail is the best possible way.

27 MR. LO FASO: But just to be clear, I
28 appreciate what you're saying, but it's a matter of

1 discretion versus a matter of requirement, which is to
2 say, if you are going to -- do you -- are you saying you
3 don't want to give Board Proceedings discretion to do
4 something without a record, even though Board
5 Proceedings knows it's wise to have the record and most
6 of the time they'll do it?

7 MR. HELLER: Well, I am really not trying to
8 deprive people of discretion.

9 I'm just really concerned that we don't end up
10 at hearings where there's a taxpayer who says they never
11 received anything.

12 Board Proceedings is say, "Yeah, yeah, you came
13 to the window," or, "Yeah, yeah I sent you an e-mail."
14 Then that guy goes, "Well, I never received your
15 e-mail".

16 MS. MANDEL: We had that some years ago. There
17 was a big blowup in the Board room a few years ago where
18 somebody said they didn't get something or when was
19 something done and we had to drag the Board Proceedings
20 staff down to the Board room and, "When was this
21 mailed?", et cetera, et cetera, et cetera.

22 Now we get that little thing before the Board
23 meeting that has, "Here is all of the stuff," when
24 things were mailed, when things were done because there
25 was a big blowup about whether something was sent and
26 received.

27 That might be what you are recalling and being
28 concerned about

1 MR. HELLER: That is.

2 MS. MANDEL: Giant blowup.

3 MR. LO FASO: That's fair, I am -- Brad

4 answered my question that he wants to require it and I'm

5 typically in favor of flexibility, but I think you've

6 overcome my presumption.

7 Thank you for your comments.

8 MR. MICHAELS: I understand too.

9 I mean, you've sort of got a traditional view

10 that the main file has to have a hard copy of the

11 document, there's got to be some central file that has

12 sort of the traditional, old-fashioned version of

13 everything.

14 MR. KOCH: Showing that it was mailed.

15 MR. HELLER: Correct.

16 MR. KOCH: The problem I had is we never

17 received it at all until we heard it. And that's not

18 atypical of the hearings we have had.

19 MR. HUDSON: Brad, that goes to my point, if

20 you had e-mailed it to him, you would know --

21 MR. KOCH: I don't know that we've ever

22 received a separate one for any of our hearings.

23 MR. HELLER: Well, I think --

24 MR. AMBROSE: Lou Ambrose, what record do you

25 have if you just mail it and it's not done certified

26 or --

27 MS. MANDEL: Right, he could still say -- just

28 say it never came back.

1 MR. HUDSON: If the key is tracking when it was
2 sent and who got it and when did he open it and all that
3 sort of stuff, e-mail provides a better record.

4 So, I don't want to just use the rule to
5 prevent e-mail, even though it's the superior means of
6 communicating this kind of thing

7 MR. HELLER: Well, I think -- I'm more than
8 happy to go ahead and work with Board Proceedings staff
9 to figure out whatever Gary Evans or anyone else there
10 thinks is an appropriate means that they think they can
11 implement in some kind of a structured format that's not
12 going to lead to problems down the road.

13 My biggest concern -- and it's really -- I've
14 never -- you know, I have full faith all of our
15 employees will carry out whatever procedures that will
16 be put in place, I am just still a little leery --
17 people think that electronic everything is the most
18 efficient, most secure way to do things, but it does
19 have limitations.

20 Things disappear. People can't access
21 computers entirely for entire days at some times and
22 that means that electronic records we're looking for
23 won't be accessible.

24 So, I'm very concerned of just jumping both
25 feet into electronic transmissions until we have
26 established what it is we're doing.

27 So, I don't have a objection, though, to try to
28 do it in some manner that we all -- you know, especially

1 Board Proceedings, could just feel that they're
2 comfortable with the procedures so that when they're
3 called before the Board they can establish whatever is
4 necessary, then I don't have a problem with it.

5 I have never tried to take away the discretion
6 to do things in a more appropriate manner.

7 MS. MANDEL: That's whose head it's going to be
8 on.

9 MR. HUDSON: Mail or otherwise provide, we're
10 not -- we don't need to have this discussion now, that's
11 something they can discuss as a policy matter any time
12 that they want.

13 They don't have to go through the regulatory
14 process. You might just want to have both sentences
15 say, "Mail or otherwise provide," and then we can save
16 that discussion for them -- see what kind of security
17 they can -- their comfort level is if they have to
18 e-mail or hand deliver documents.

19 MR. HELLER: Well, I'm -- the only caveat I'll
20 say is I'm going to have a discussion with them first,
21 then I will change the language, assuming that they have
22 something that they can recommend other than just
23 mailing, which, I am pretty hopeful that they will have
24 something else.

25 But I just want to make sure that there's
26 something before -- because I know like -- I hate to
27 present the Board Members with language that seems to
28 convey that we're going to do something, if, in fact,

1 staff really doesn't have any plan of doing something
2 different.

3 So, I want to make sure that we do have that
4 alternative and that there is some other way of
5 providing, then I will put the language in so that we
6 don't end explaining that, "Well, it's just good feeling
7 language."

8 But I do think those are all great comments and
9 we do want to make this -- our goal is to get this
10 information to the taxpayer as quickly as we can so they
11 can act on it.

12 And we just want to create a record. So, I
13 think we can definitely move forward and try to do
14 something that gives more strength.

15 MR. FOSTER: We need to take a break for about
16 fifteen minutes or so.

17 MR. MICHAELS: Could you give us a preview of
18 what lies ahead?

19 We've done a lot of the stuff in the back here,
20 but I'm am just trying to get a grasp of what's left.

21 MR. HELLER: We're going to be going into
22 additional briefing, which deals with situations the a
23 briefing provided in normal briefing procedures, that
24 are in the different chapters, has still not provided
25 all of the information that might be appropriate to the
26 Appeals Division or Board Members.

27 We're dealing with preparation for Board
28 Hearings and the issuance of subpoenas; the presentation

1 of the evidence at the specific hearings; witnesses.

2 MR. MICHAELS: Is that where it ends?

3 Because this is where the stuff we talked about
4 before gets just picked up.

5 Is there any more after page 24 that --

6 MR. HELLER: After page 24 we do restart again
7 and that will be on -- that will start with page 29,
8 with Article 3.

9 MS. MANDEL: All that stuff I've marked on
10 here.

11 MR. HELLER: That's dealing with the public
12 agenda notice.

13 MS. MANDEL: This is all of the stuff
14 (indicating).

15 MR. HELLER: Day of the oral hearing -- all
16 kinds of things, yes, Board meeting --

17 MR. EVANS: Fun stuff.

18 MR. HELLER: Quite a few more, call to order,
19 order of business and allocation of arguments for the
20 hearing, time for the hearing, public comments.

21 MR. MICHAELS: Okay, thanks, you answered my --
22 at least for my purposes.

23 MR. HELLER: Unfortunately, there is still
24 quite a bit of information.

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SECTION 5000.5012
ADDITIONAL BRIEFING

MR. FOSTER: Okay, we are going to get started again. Section 5012 on page 19. But first Brad wanted to say something.

MR. HELLER: Right. Real quickly since it's getting late in the day, I just wanted to point out that, you know, if there's any comments that anybody wants to hold or anything that they -- they just forget to ask or make a comment about today, that we -- you know, we're accepting written comments for quite a long time to come and I'm available by telephone and e-mail and everything else, as well, if you'd like to discuss anything with me outside the meeting.

And with that we're just going to go ahead and see how -- as far as we can get today. Hopefully we can conclude everything today, as well.

MR. MICHAELS: And there are no other -- or no future interested parties meetings about this project planned, is that correct?

MR. HELLER: There are none planned as of right now. There could be changes to the schedule, though, and there might be additional meetings, although I don't expect there to be. But I wouldn't swear there wouldn't be one.

MR. FOSTER: Page 19. Section 5012, Additional Briefing. No questions?

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SECTION 5000.5013

PREPARATION FOR BOARD HEARING AND SUBPOENAS

MR. FOSTER: Page 21, Section 5013, Preparation for Board Hearing and Subpoenas.

MR. MICHAELS: I -- Peter Michaels. I gather that this section or the subdivision about subpoenas was added at the suggestion of somebody.

MR. HELLER: I believe that was --

MR. MICHAELS: I don't need to know who it was.

MR. HELLER: Yes, it was a suggestion --

MR. MICHAELS: Yeah.

MR. HELLER: -- and I think it was language that we had omitted that is in the current Rules of Practice --

MR. MICHAELS: Right.

MR. HELLER: -- that were similar to it.

MR. DAVIS: And that's correct, that -- that came out of your -- the current version of the rules.

MR. HELLER: I believe the FTB can take credit for that, as well.

MR. FOSTER: Right.

MR. MICHAELS: And this Preparation for Board Hearing and Subpoenas section, does that apply to Property Taxes?

MR. HELLER: I believe so.

MR. MICHAELS: Additional time, a party may request additional time to present a complex matter.

MR. HELLER: Uh-huh.

1 MR. MICHAELS: Really?

2 MR. HELLER: That is correct. There is no
3 distinction and that it wouldn't have it apply to
4 Property Tax matters. Of course, you know --

5 MR. MICHAELS: Too bad Lou is not here. That's
6 not going to work very well. I mean, you know, just --

7 MR. HELLER: Well --

8 MR. MICHAELS: -- because of the -- the
9 calen -- the stat-- the calen -- the calendar is
10 totally, as you know, driven by statute. And the Board
11 doesn't have any real flexibility there.

12 MR. HELLER: As far as --

13 MS. CROCETTE: I have a question. This is
14 Sabina. Is that really relating to a change in the date
15 or having more time for presentation?

16 MR. KAMP: Yeah --

17 MR. HELLER: This one is additional time for
18 presentation.

19 MS. CROCETTE: Which is --

20 MR. MICHAELS: Oh, you're quite right, Sabina.
21 I'm sorry, I -- I looked at the caption which says,
22 "Preparation," and you're right, this is just asking for
23 long -- more time to make -- make your case. Thank
24 you.

25 MR. HELLER: Right. And it's suggesting that
26 the request be submitted before the hearing so that we
27 can make the agreements.

28 MR. MICHAELS: That -- that's totally fine. I

1 misread it.

2 MR. HELLER: Perfect.

3 Al.

4 MR. KOCH: Al Koch. Additional briefing. Now,
5 I guess the briefing schedule is set forth in Part 2.

6 MR. HELLER: It would depend on the program
7 that you're looking at, but each program's briefing
8 schedule is contained in its chapter. So --

9 MR. KOCH: Yeah.

10 MR. HELLER: -- for Business Taxes in Chapter
11 2. Property Tax Chapter 3. And Income Tax is Chapter
12 4.

13 MR. KOCH: Okay. And how does it work, if
14 you'd refresh my recollection, on Business Taxes?

15 MR. HELLER: On Business Taxes right now would
16 be based on the issuance of the hearing -- well, the
17 Notice of Hearing. And I believe there's actually going
18 to be -- we're -- we're considering submitting two
19 alternatives to the Board Members, but as of right now
20 the two alternatives that are proceeding, one has the
21 issuance of the -- of the Notice of Hearing 60 days
22 before the hearing.

23 It gives the taxpayer until 45 days before the
24 hearing to file its opening brief, which is not
25 required.

26 It gives the Department 15 days from then,
27 which would be until 30 days before the hearing, to file
28 a reply.

1 It gives the taxpayer then 15 more days or 15
2 days before the hearing to file its reply or its
3 response to the Department's reply. And that would be
4 the general briefing schedule.

5 But there's also an alternative that
6 staff I believe intends to recommend to the Board
7 Members, which would require that Notice of Hearing to
8 go out 75 days before the hearing.

9 Then that would give the taxpayer 20 days or
10 until 55 days before the hearing to file its opening
11 brief and give the Department 20 days, which would be up
12 until the 35 days before the hearing to reply.

13 Then give the taxpayer only 15 days, like the
14 other rule, to file a response to the Department's
15 reply. Since they're generally limited in scope.

16 And then that would also end up providing the
17 Appeals Division with an extra 20 days to consider that
18 additional briefing in preparing its hearing summary

19 MR. KOCH: Okay. Now, the request for
20 additional briefing excludes the taxpayer or
21 the petitioner, whoever it is, because they just filed
22 their reply brief.

23 So, presumably they don't need to file anything
24 else. Or at least if they did, they wouldn't know.

25 MR. HELLER: Well, what this --

26 MR. KOCH: Now -- now, if -- if the -- if the
27 staff files a request for additional briefing, and
28 that's granted, does the taxpayer have the ability to

1 reply?

2 MR. HELLER: To -- oh, I think in this case --
3 let me -- let me go back a little bit.

4 Really, what the additional briefing is
5 designed to do would be in a situation where we've
6 completed the briefing process as prescribed by the
7 particular chapter. So, for instance, we're at the --
8 under our normal current rules in a Business Taxes
9 appeal, let's say we get to the 15 days before the
10 hearing and the taxpayer has just filed its reply or its
11 response to the Department's reply.

12 At that point the Appeals Division or the Board
13 Member staff can take a look at the briefing that's been
14 submitted to that point. And if they determine that
15 there's insufficient briefing or evidence, then they can
16 request additional briefing from either party.

17 And so, in that case then they would go ahead
18 and specify what briefing they want. And as far as --
19 as replying to those, there is no specific provision
20 that would say if additional briefing is requested from
21 a specific party that the other party gets to reply to
22 that brief. That's not currently provided in -- in this
23 regulation. And it really just has the Board and the
24 Chief of Board Proceedings specify a briefing schedule.

25 So, to the extent that they want to have a
26 reply they can certainly order a reply and then can set
27 any schedule they want for a response. So --

28 MR. KOCH: If the burden of proof is on the

1 taxpayer or the -- the petitioner, whoever it is, I
2 would think it would be normal for them to be able to
3 reply. We actually had that circumstance come up in one
4 of our cases where the Board was allowed to file a
5 second reply brief because an amicus had filed a brief.

6 So, then we were allowed to respond to that, as
7 well. And I think that is appropriate.

8 MR. HELLER: Well, I think in this one -- I
9 don't -- we'll definitely take your comment under
10 advisement. And I think -- you know, in this case we're
11 really just talking about something where there's been
12 plenty of briefing, everybody has been represented, but
13 for some reason there's some small item, usually,
14 missing or some specific fact or something that want --
15 that the Board just wants addressed in a short period of
16 time before the hearing.

17 So, there's competing considerations there, but
18 I think definitely we want to consider making sure --

19 MR. KOCH: I certainly would, yeah.

20 MR. HELLER: -- that the taxpayer has due
21 process and an ability to respond to any information
22 that might be presented.

23 MR. KOCH: I also think I'd like the 75 days
24 better because the longer the Board Members and staffs
25 have to review the materials, the better it is.

26 MR. HELLER: I agree. And that's this staff
27 member's recommendation.

28 MR. KOCH: Right. Yeah.

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MR. HELLER: Okay.

MR. FOSTER: Any other comments on 5012 or
5013?

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SECTION 5000.5014

PRESENTATION OF EVIDENCE OF EXHIBITS

MR. FOSTER: Section 5014, on page 22.

MR. MICHAELS: Actually, I -- oh, yeah, 5014.
Perfect.

Yeah, on (a) it -- it says here, "Settlement offers and information in -- discussed in settlement negotiations are not -- not generally considered relevant evidence."

There, I guess, are exceptions or -- when it says "not generally" -- how come it says "not generally" as opposed to "not"?

MR. HELLER: Well, let me -- I'll address that and then we'll continue the discussion. But essentially this particular language -- this particular language, you know, the -- the issue of settlement discussions was raised with staff and staff tried to prepare -- I tried to prepare language that would -- would convey the idea that settlement negotiations or information regarding settlement negotiations is generally -- is just simply generally not relevant.

However, we used the language that it has there to convey the idea that -- that I am not the final arbiter of what's relevant and to the extent that a Board Member determines something to be relevant then they're the trier of fact and they're deciding what's relevant.

So, that was what the intention of that

1 language was, was to give -- still continue to give the
2 Board Members the discretion to decide whether something
3 is relevant as opposed to the regulation doing so.

4 MR. MICHAELS: Yeah. And -- and I mean, I
5 could just see someone saying -- I mean, is this license
6 to say, well, you know, we came real close in -- in a
7 hearing we came real close to settling this case, and if
8 the staff had gone along with our, blank, you know, we
9 would have settled it.

10 You know, that's almost goading a Board Member
11 into saying, well, I move that we just -- you know,
12 adopt that and then let's see what -- if it sticks or
13 not.

14 MR. HELLER: Absolutely. Well, it was not
15 intended to sanction that, it was intended to -- to
16 discourage it, in fact, was the intention.

17 However, it may not be accomplishing its goal
18 and I'll let -- quickly let Ken Davis discuss some
19 comments that FTB made to improve it.

20 MR. DAVIS: Let me -- the FTB is -- we want to
21 weigh in on this. And particularly our Settlement
22 Bureau wants to weigh in on it.

23 And -- and, Peter, we're concerned exactly for
24 the -- the same reason you're -- you're stating, and
25 that is the language seems to imply that settlement
26 offers can be -- possibly be presented in Board
27 proceedings, or Board -- settlement discussions. Can be
28 brought up at Board hearings. And that the Board

1 Members would then give it no weight.

2 We're concerned about that because the -- the
3 Settlement Bureau has a settlement program, which is --
4 which was adopted by the Legislature in 1992, and has
5 been a very successful component of -- to help taxpayers
6 as well settle matters for civil disputes.

7 Last year brought in -- or it settled over \$1.5
8 billion in -- in settlements. And we're concerned that
9 this might -- that the language as presented might
10 undermine or -- or damage a key component of the
11 Settlement Bureau's program. That is the
12 confidentiality of settlement discussions.

13 And the way the settlement program works, and
14 we've -- at the suggestion of Brad we've included the --
15 the start -- one of the starting documents to the
16 program, which is a non-disclosure agreement. If a
17 par -- person wants to go into the settlement program,
18 they sign a non-disclosure agreement not to discuss the
19 statements that are made in the settlement program
20 outside of the process. And that's typical of any
21 settlement program.

22 So that settlement discussions aren't normally
23 brought up in a Court, they're not brought up in any
24 other adjudicatory forum. And we don't think it's -- it
25 be -- it would be helpful to bring it up in -- in the --
26 before the Board.

27 But more importantly, number one, it's -- it
28 could be harmful because we think it's just not

1 necessary. And, number two, it -- it hurts the
2 program's -- it could brought a chilling effect on the
3 program, itself.

4 So that if a taxpayer was in the program and
5 they said, well, the statements I'm making are -- could
6 damage my own case but they might be admissible or they
7 might come -- come out in a Board proceeding, well,
8 that's going to -- that's going to hurt that taxpayer.

9 So, we've tried to put in -- suggest that up
10 front in a Board regulation that -- that the statements
11 made in settlement are inadmissible. So that -- so that
12 a taxpayer knows at the outset they shouldn't even try
13 to introduce them.

14 And -- and we've put in a regulation that kind
15 of speaks to that issue.

16 There's some exceptions to the -- to that,
17 the -- kind of the prohibition or the inadmissibility,
18 and that is, for instance, if there's key facts that
19 come out in the settlement process, those -- and those
20 key facts would have come out in an FTB discovery or a
21 taxpayer discovery, those key facts can be brought
22 before a Board.

23 But the fact that the FTB sought to compromise
24 the -- the settlement or the tax liability with making
25 an offer, that type of discussion should not be --
26 should not go before the Board and -- and should be
27 considered inadmissible.

28 So, that's a little brief overview of the -- of

1 how we envisioned the program or the regulation.

2 MR. FOSTER: I could back up Brad's point a
3 little bit about how he -- he wanted to make -- you
4 know, reflect the fact that he or -- neither he nor I
5 nor any of us in Legal are the final arbiters. The
6 Board ultimately is going to decide what they think is
7 relevant.

8 There was an Income Tax case recently where the
9 taxpayer introduced a settlement offer as evidence as an
10 exhibit. And it -- and it was harmful to their case,
11 ultimately. Very harmful. And I -- because it was a
12 settlement discussion, I respected it, and even though
13 the taxpayer had now waived their confidentiality by
14 introducing it, I respected the intent of the settlement
15 program. I did not discuss it in the hearing summary.
16 I did not bring it up in front of the Board.

17 But at the hearing a Board member said, "Isn't
18 that in the file?"

19 And I said, "Well, yeah."

20 And the Board Members wanted to see it. So,
21 out it came. They decided it was relevant, and I'm not
22 sure how much weight they gave it, but --

23 MR. MICHAELS: Well, did they decide it's
24 relevant or did they decide they were curious to see it?

25 MR. FOSTER: Well, they decided that they
26 wanted to know what the amount of the offer was.

27 MR. HUDSON: Tom Hudson. I have two -- two
28 comments. One is I don't think we're using the right

1 word here. I mean, "settlement offers" I would assume
2 that they're almost always relevant under the California
3 Evidence Code. If you're using the word "relevant" the
4 way the Evidence Code does, that they are relevant.
5 They tend to prove a fact that's in dispute.

6 But -- but that's not the issue. It's are they
7 admissible or they're something that we should be
8 talking at the hearing.

9 So, "relevant" is not the word to use. That's
10 the first comment I would make.

11 Second of all, I'm wondering if -- if we're
12 really helping --

13 MR. MICHAELS: What -- what is the word?

14 MR. HUDSON: Well, I'd have to go back -- and
15 check, but "relevant" means, you know, tending to prove
16 a fact --

17 MR. HELLER: Right.

18 MR. HUDSON: -- that's in dispute. And -- and
19 they -- they certainly do tend to prove a fact that's in
20 dispute. That if you're saying you have a strong case
21 and the evidence you've presented proves Point X, well,
22 then why were you willing to give it up without a fight
23 in your settlement?

24 But -- so I'm just saying it's a wording
25 choice, it's maybe the wrong word to use, but -- but,
26 secondly, maybe the broader point is I'm wondering if we
27 gain that much by putting this language in these
28 regulations at all, like even mentioning settlement

1 discussions. Because I don't know, and I'm not sure I
2 have the right answer to this, I'm not sure who the
3 target audience of these regulations are. But if
4 they're sophisticated people, you know, then they're
5 going to typically understand the general rule that you
6 don't present, you know, testimony about settlement
7 offers and things.

8 So, if they're sophisticated folks then -- then
9 they don't really need that. And if they're
10 unsophisticated folks, then I'm not sure what good it
11 does putting it in here, because they won't know what
12 things were said to them as part of a settlement offer
13 and they won't understand where to find out whether or
14 not they're allowed to do that.

15 I just think we're -- maybe this is something
16 that can't really be addressed by regulation very well
17 and maybe that's something the Board Members should
18 just, you know, as a practice say if somebody gets into
19 settlement negotiations we'll just advise them that
20 that's -- that's not something we're here to discuss.
21 We want to see the facts and the evidence you have to
22 present.

23 MR. DAVIS: Well, if I could just comment
24 that -- Ken Davis, at least as to the Evidence Code,
25 which is 1152, and the -- there's a corresponding
26 Government Code that's used in other adjudicatory
27 processes for the -- under the A.P.A. It's 11415.60,
28 and it's referenced in the -- the comments we made.

1 At least they -- they say -- and I think you
2 key off on the issue, it's really the inadmissibility of
3 settlement discussions. And that means that it's not
4 even invited for -- to be presented --

5 MR. HUDSON: Right.

6 MR. DAVIS: -- into -- into evidence.

7 So, if it's inadmissible, it doesn't even get
8 heard or considered. At least that's where we were
9 headed.

10 MR. HUDSON: Whether it's relevant or not,
11 that's the whole point.

12 MR. DAVIS: Whether it's relevant or not. And
13 the other thing is there are many times when offers of
14 compromise are made that really don't go -- and the
15 Government Code talks about that -- as well as the
16 Evidence Code, both talk about they're inadmissible to
17 prove liability. Because many times offers are made not
18 because their -- their party is at fault, it's because
19 the cost of litigation or the -- the resources to -- to
20 go fight the issue are -- they -- they're more important
21 in terms of -- and they'd rather settle.

22 So, sometimes it doesn't prove the issue of
23 liability but overall the overriding premise is that
24 there should be this free flow of information in the
25 settlement process, and it doesn't get before the Board

26 So that's -- and the other issue is, if I can
27 comment, I think the -- the regs. are really designed
28 for the non-sophisticated -- or unsophisticated taxpayer

1 so that they just know at the outset this is not
2 admissible.

3 At least that's our -- our thoughts on it.

4 MR. AMBROSE: Then -- this is Lou Ambrose.
5 Then I -- I think that you would have to carve out an
6 exception, you know, as Tom and Ken have indicated to --
7 that -- that it isn't admissible. Because, you know,
8 the general idea -- the general concept is that, you
9 know, this is an administrative hearing. You know,
10 evidentiary rules don't apply and all that sort of
11 thing.

12 But, I mean, obviously, you know, there's a
13 pretty strong feeling that they do. I mean, at least
14 this particular --

15 MR. HUDSON: At least -- not the hearsay rule,
16 but the evidence rule.

17 MR. AMBROSE: Right. Yeah.

18 MR. DAVIS: At least into this one area.

19 MR. AMBROSE: Yeah, right.

20 MR. MICHAELS: Maybe -- maybe the caption here
21 should instead of saying "relevant evidence" should say
22 "admissible evidence", possibly, following up on what
23 Tom said.

24 MR. AMBROSE: But -- but I think relevance is
25 really the standard that, you know, they follow, you
26 know, before this Board and, you know -- well, in local
27 appeals, too.

28 MR. MICHAELS: Well, I mean, yes and no. I

1 mean, it's a philosophical discussion. You know, when
2 the Board -- whoever gave that example, the Board Member
3 wanted to see what the offer was.

4 MR. AMBROSE: Right.

5 MR. MICHAELS: I'm not sure that's probative,
6 particularly. I mean, it's a -- a judgment call, you
7 know.

8 MR. AMBROSE: It is.

9 MR. HELLER: Yeah.

10 MR. MICHAELS: It might have been prurient and
11 it might have been probative. There's no way of
12 knowing.

13 MR. HELLER: Well, I do think -- I do --

14 MR. LO FASO: Alan LoFaso. I'm confused as to
15 whether we're casting down what we do now or we're
16 starting to walk down a policy discussion for Members as
17 to whether we're going to have a new inadmissibility
18 rule on settlement offers.

19 MR. HELLER: Correct.

20 MR. MICHAELS: Well, what -- what's the old
21 rule?

22 MR. LO FASO: That's -- that would be implicit
23 in my question.

24 MR. MICHAELS: Well, there -- there isn't one.

25 MR. HELLER: The old rule was that any relevant
26 evidence could be presented to the Board.

27 MR. MICHAELS: Yeah.

28 MR. HELLER: And so --

1 MR. MICHAELS: Yes.

2 MR. HELLER: -- to the extent that a Board
3 Member or the Board as a whole determined that something
4 is relevant, then it could be presented and that, you
5 know, contrary to other things it could -- there was no
6 policy prohibiting the Board from accepting settlement
7 negotiations or discussions. And I think they've
8 refrained from doing it, and the parties are refrained
9 from introducing that information.

10 But there's no -- there hasn't been any written
11 policy preventing --

12 MR. MICHAELS: But --

13 MR. HELLER: -- preventing its introduction
14 or --

15 MR. AMBROSE: But I think that the safeguard,
16 the thing that would prevent a party or FTB or a
17 taxpayer from -- is -- is the agreement, itself. Am --
18 am I correct? Ken?

19 Because we had -- I -- I had an appeal
20 recently, the -- either the last Board meeting or the
21 one before that, where FTB presented a couple of
22 declarations from the attorneys who participated in the
23 settlement discussions, not -- not to prove the fact or,
24 you know, the amounts that they were going to settle on
25 or even really the details, but just to dispute or
26 refute a representation that the taxpayer was making.

27 The taxpayer was claiming that he hadn't been
28 notified of -- I can't remember what it was. But it

1 didn't really help his case, anyway. But he wanted to
2 show, you know, sort of bad faith on the part of FTB.

3 And so, these two attorneys, you know, executed
4 a declaration where they said, well, we -- we did inform
5 him, you know, in this discussion and, you know, A, B
6 and C was discussed.

7 But it wasn't -- it wasn't being introduced for
8 the purpose of, you know, showing what the parties could
9 have settled on or, you know, how this could have been
10 resolved. It was -- it was to refute -- but -- but the
11 taxpayer's attorney in that case actually -- and I -- I
12 don't know what happened because this was a Culver City
13 hearing and I wasn't there, but wrote a pretty
14 strongly-worded letter, I -- I believe to the Board
15 Members, you know, objecting to this and, you know,
16 threatening to, you know, have the attorney sanctioned
17 and, you know, that sort of thing.

18 MR. DAVIS: There are other exceptions to
19 the -- or in the Evidence Code as to how certain
20 things in -- how certain statements in settlement can be
21 considered admissible. As long as you're not talking
22 about the settlement discussions, themselves, or an
23 offer, but if it's -- if it relates to fraud, if it
24 relates to the use of settlement discussions for the
25 purposes of delay.

26 If it's not intended for the purpose of
27 conveying an issue related to liability or a compromise
28 in -- of -- of a civil liability then at times through

1 the Evidence Code it is admissible.

2 So there's a little -- there's a little carve
3 out there.

4 MR. AMBROSE: So, notwithstanding the -- the
5 agreement that --

6 MR. DAVIS: Right. Now --

7 MR. AMBROSE: -- this guy entered into.

8 MR. DAVIS: And it's -- and our -- and our
9 agreement specifies some of those issues, as well.

10 The issue is, at least for us -- is the current
11 language -- or the proposed language, settlement offers,
12 discussed in settlement negotiations are not generally
13 considered relevant, to us is going to invite more --
14 possibly invite someone to introduce these settlement
15 discussions, and we think that's -- I mean, that's a
16 real concern to us.

17 MR. HUDSON: And I guess to follow up with
18 this --

19 MR. DAVIS: Despite settlement -- or
20 non-disclosure agreement.

21 MR. HUDSON: And my followup to your -- your
22 point on that where I'm agreeing with you is that,
23 furthermore, the way this is being phrased it appears
24 that -- because we're saying they're not generally
25 considered relevant evidence, it appears that we're
26 making the key issue is it relevant. You know, is it
27 -- is it probative of a fact that's in dispute.

28 And that appears to be the determinative

1 factor. And -- and that's not supposed to be the -- the
2 thing we're talking about when we're talking about
3 whether it's inadmissible. There's totally different
4 policy reasons for keeping it out that has nothing to do
5 with relevance.

6 So, -- so I think this sentence is not helpful,
7 is what I'm saying. You should either take the whole
8 thing out and not address the issue, or if we -- if we
9 have to address the issue because it has been explained,
10 maybe, if we're dealing with unsophisticated folks who
11 might see this regulation and not -- not know anything
12 about the general policy -- if we have to say something,
13 then we should just say very plainly that it's -- it's
14 inadmissible as plainly as we can.

15 MR. DAVIS: And at least we'd like the Board
16 staff to consider it, and the Board staff might have its
17 own, as Brad pointed out earlier -- might weigh in on
18 it -- they have their own settlement program which is
19 mandated by the Legislature, as well.

20 And so -- and I don't know how -- if they've
21 had similar or other experiences.

22 MR. HELLER: All right. And I -- hopefully, I
23 mean -- I think these are all absolutely valid and
24 valuable concerns, and -- I mean, I agree 100 percent
25 with Tom that we need to have a clear statement to the
26 readers at whatever level of expertise they have as to
27 what it is we're trying to direct them to do here.

28 And I also agree that there's valuable reasons

1 to preserve the both agencies' settlement programs and
2 doing stuff to make it appear that settlement
3 negotiations might be introduced could hamper those
4 programs.

5 Having said that, I'm not a hundred percent
6 sure that I could come up with something that's going to
7 work properly and address both concerns. I definitely
8 think I can, you know, delete the word "relevant" and
9 use something like admissible so that it's very clear
10 whether it's admissible or not, and we don't get into
11 the discussion of relevancy.

12 As far as how far I can go to making it a 100
13 percent hard and fast rule that these things are not
14 admissible or even a rule that mimics the Evidence Code
15 and creates exceptions where settlement negotiations
16 might be admissible under certain circumstances, I'm not
17 sure if I can -- I can accomplish that goal for our
18 purposes.

19 And mainly just because it does represent a
20 change in the Board's current policy. So, as I -- to my
21 understanding, the Board's current policy is not that
22 settlement negotiations are absolutely prohibited.
23 There's nothing that says that it's a fast rule.

24 As far as I know.

25 MR. MICHAELS: There is no policy, really.

26 MR. HELLER: It's basically just that relevant
27 information. And so, as we understand it even in this
28 room, there's -- there's definitely some folks who would

1 find probative value in settlement negotiations. So --

2 MR. DAVIS: Everybody would in some cases.

3 MR. HELLER: So there is -- there's relevancy
4 there, so as far as -- you know, my concern is just that
5 staff does not want to take away the Board Members'
6 right to discover evidence that they consider relevant
7 and admissible where they are not even required to
8 exclude the evidence by statute.

9 So, staff's definitely going to take a look at
10 it. And so, if there's some way to convey what's being
11 done there either as recommended if it -- if it appears
12 that our management is comfortable recommending that the
13 Board change its policy that way, or if not then we may
14 even end up with something more towards what Tom is
15 suggesting, which is deleting the reference so as to not
16 mislead people over what settlement and how settlement
17 negotiations are treated.

18 And those are things that we could even discuss
19 in a separate publication or something like that, which
20 I think there's some of the Board Members are indicating
21 they may want us to do regardless of what -- how these
22 rules turn out, because there's numerous activities that
23 go on that aren't being discussed in the rules that
24 might be relevant to somebody. And certain things that
25 are just not regulatory in nature but guidance would be
26 helpful.

27 So, there could be an ability to have a
28 publication that talks about evidence in a way that's

1 more general that conveys the same information without
2 adding a bunch of ambiguity to our regulation.

3 So, I'm going to definitely take up all the --
4 the comments and see if there's some way I can meld them
5 into something that -- that my management can recommend
6 to the Board.

7 And if I can do that, then I'll do it to the
8 best of my ability. If not, then my next suggestion
9 would probably be -- I don't know, I'd probably either
10 delete the language or -- or retain something similar to
11 the current, at least change the word "relevant" to
12 "admissible" so we don't raise the relevancy issue.

13 But, like I said, I'm going to try to look
14 through it all towards the best possible resolution.
15 So -- so, hopefully I can get something that's
16 satisfactory to everybody, would be my goal.

17 MR. FOSTER: Any other comments on Section
18 5014?

19 MR. MICHAELS: Yes. Sorry.

20 But on page 23, (d), Official Notice, there are
21 a couple of things that I -- I am not clear on -- one,
22 I'm -- I'm not sure what the significance in the first
23 place is of -- of official notice. I noted -- I do
24 officially hear notice that tax returns are included.
25 Which in the case of a State assessee would be the
26 Business Property Statement.

27 And then my final point or concern is after 3
28 it says, "The parties may at the hearing or through a

1 petition for rehearing refute any matter thus noticed."

2 So, there's like -- I guess if -- if you think
3 that what, the official notice is, what, wrong or --
4 what -- what are you refuting?

5 MR. HELLER: Well, my feeling would be normally
6 you're not refuting anything. Most of these documents
7 either exist or they don't exist, and they contain the
8 information that they do.

9 MR. MICHAELS: Yeah.

10 MR. HELLER: However, I think there's -- I'm
11 aware of some cases where there's a dispute over whether
12 something is properly being noticed at all. And whether
13 it's subject to being noticed --

14 MR. MICHAELS: What does that mean, being
15 noticed?

16 MR. HELLER: Well, what this is, it's really --
17 what we're trying to do is create a concept --

18 MR. MICHAELS: What's "official notice" mean?

19 MR. HELLER: -- close that's the same as
20 judicial notice. And what that means is when you're --
21 you know, when you're in front of a Court of law, the
22 Court can take notice of certain information that's
23 publicly known and treat it as if it were evidence
24 introduced at the -- at the -- in that proceeding.

25 MR. KOCH: It's a hearsay exception.

26 MR. HELLER: So, yeah, for instance they can
27 recognize that an article was published in the L.A.
28 Times on "X" date about this railroad yard or something

1 to that effect.

2 MR. MICHAELS: Yeah.

3 MR. HELLER: That would be the kind of thing
4 that would be noticed. And then what happens, though,
5 is my experience, and I'm very limited experience in --
6 in trial work, but essentially when something is
7 judicially noticed, that's -- there are oftentimes
8 disputes over whether it's the type of information that
9 should be noticed.

10 And then, also, whether or not it's really
11 being used to like prove something when in fact judicial
12 notice is usually used to acknowledge that something's
13 occurred or something's happened, and take -- take
14 notice of a fact as opposed to take notice of --

15 MR. MICHAELS: Opinion.

16 MR. HELLER: -- something that asserts the
17 existence of something else and creates an argument.

18 So, there are situations where I think somebody
19 might want to object or -- or file something that would
20 dispute the Board's decision or -- or a party's
21 recommendation to take notice of something.

22 And we did put that language in so that
23 somebody -- so it would be clear that if this is
24 happening at your hearing you can object there, and as
25 well -- and I realize that not everyone can file a
26 petition for rehearing, but to the extent that they can
27 they can also object in the petition for rehearing.
28 Since one of the grounds is an irregularity in the

1 proceeding. Also failure to follow the law.

2 MR. MICHAELS: So -- and, Lou, I kind of have
3 you in mind maybe to comment on this, too, the caption
4 here is "Presentation of Evidence or Exhibits." And it
5 says in here that the -- the Board may take official
6 notice of -- basically, if you look at (d)(1), records
7 maintained by the Board -- well, for example, a State
8 assessee, that's going to be every possible thing that,
9 you know, the State assessee has ever been asked to or
10 voluntarily produced for that given year or ever in its
11 history.

12 MR. HELLER: Uh-huh.

13 MR. AMBROSE: Ever, yes.

14 MR. MICHAELS: So, is the Board taking some
15 kind of official notice there? Does that legitimize the
16 public discussion of -- of basically in the -- in the
17 example I'm using, everything and anything that ever was
18 turned over to the Board?

19 MR. HELLER: Does that authorize a public
20 discussion of it?

21 MR. MICHAELS: Well, it -- I mean, this --

22 MR. HELLER: I mean, I think --

23 MR. MICHAELS: -- Presentation of Evidence or
24 Exhibits. So, this would seem -- I don't mean to sound
25 argumentative, I mean I'm thinking about it for the
26 first time.

27 MR. HELLER: Oh, no, I understand.

28 MR. MICHAELS: But -- but it says,

1 "Presentation of Evidence or Exhibits." Well, that does
2 sound kind of like it's part of the actual argument in
3 the case, yeah.

4 MR. HELLER: That's right.

5 MR. MICHAELS: And then official notice
6 would -- well, yeah, does the scope of official notice
7 for a State assessee cover literally everything the
8 Board maintains? According to this, it would seem to.

9 MR. HELLER: Well, it's -- it's really still --
10 I mean, I think that they can judicially notice any
11 record of the Board. However, it's not -- wasn't
12 the -- the idea behind it was not that we would just
13 rec -- notice all of these things and somehow then have
14 them moved into the record of an oral hearing.

15 The fact would be that they can now recognize
16 them and treat them as evidence that was submitted. And
17 so, I don't think that they would just say, "I'm
18 officially noticing that all our records pertaining to
19 this taxpayer," what they would say was that, "I take
20 notice of the Notice of Determination that we mailed
21 out," or "We can take notice of -- of the valuation
22 report that we did." "Now we can take notice of the
23 correspondence that we received."

24 MR. MICHAELS: And what does that mean, "I take
25 notice"? I mean, in that context -- I appreciate your
26 explanation earlier, like judicial notice, which is
27 referred to here, but --

28 MR. HELLER: Right.

1 MR. MICHAELS: Okay. So, Board Member X says,
2 "I'd like to take official notice of" fill in the blank.

3 MR. HELLER: Right

4 MR. MICHAELS: Then, so what? What does --
5 what does that -- how does that either dignify or --
6 what does that -- how does that legitimize anything?

7 MR. DAVIS: Let me -- let me offer up a
8 suggestion. I think, Peter, what you're getting to is
9 that to -- to create the record one of the parties have
10 to offer it -- offer up the evidence. And -- and,
11 therefore, that the -- the preface to this to -- under
12 official notice should be "at a party's request, a Board
13 Member may take judicial notice."

14 So, that the Board Member is not just going out
15 there and pulling something that's not presented. But
16 it's a party is requesting that the Board take judicial
17 notice.

18 MR. AMBROSE: Right.

19 MR. DAVIS: And that way you're creating a
20 record -- and -- and therefore the Board Members are
21 only considering that which is presented in evidence and
22 an official record is requested by the Board by a party
23 to take judicial notice.

24 Is that -- I think that's --

25 MR. HELLER: Yeah.

26 MR. AMBROSE: You know, and their --

27 MR. DAVIS: -- closer.

28 MR. AMBROSE: I mean -- I mean, as you said, I

1 mean there should be a request made and with the -- with
2 the State assessee appeals I don't -- I don't think that
3 the staff really does that.

4 MR. MICHAELS: Well, no, but we had some
5 looney --

6 MR. AMBROSE: It's just a general, you know,
7 blanket, you know, statement that the Board may take
8 official notice of, you know, any records within its
9 possession. But without -- which is really just kind
10 of a -- kind of a substitute for the staff actually
11 having to produce those, you know, attach those as
12 exhibits to their -- to their --

13 MR. MICHAELS: Right.

14 MR. AMBROSE: -- briefs and so forth.

15 MR. MICHAELS: Well, you know --

16 MS. CROCETTE: I have a question. This is
17 Sabina. I have a question about whether or not we are
18 saying as a matter of policy that Board Members can't
19 just say on their own, because I know it doesn't relate
20 to anybody in the room, but, you know, sometimes
21 taxpayers and their reps. do get up and say stuff that's
22 not true. And there are times when, you know, our staff
23 can't necessarily respond to that. And so, I've seen a
24 couple of instances where Board Members, who can think
25 on their feet or may have access to other information,
26 will say whatever.

27 And I just want to make sure I'm understanding,
28 are we saying as a matter of policy that that is not

1 appropriate? And if so, can you just explain to me why.

2 And then if that's not what we're saying, are
3 we saying that just in terms of what, you know,
4 especially taxpayers' representatives think, you think
5 it's most appropriate that this be based on the request
6 by either party?

7 MR. HELLER: Well, this is Bradley Heller.
8 First off, staff definitely was not trying to remove the
9 Board Members' discretion in their proposed language.
10 And still does -- still tends to agree with you that --
11 that to the extent that a Board Member wants to -- to
12 notice something that can be judicially noticed by a
13 Court of this State, I don't think that staff thinks
14 there's any reason to prohibit that from happening.

15 There are other ways that we can deal -- deal
16 with concerns about what becomes a public -- disclosable
17 public record or something like that, if that's a
18 concern.

19 MR. MICHAELS: Well, it -- pardon my
20 interruption, it is a concern because look at (c). (c)
21 says, "Board proceeding staff shall distribute copies of
22 any documentary evidence that has been submitted or
23 officially noticed.

24 So --

25 MR. HELLER: Well --

26 MR. MICHAELS: And, you know, if you go back to
27 the -- which no one in here probably does, but the era
28 of the Board Member Nevins and the era of Board Member

1 Bennett, they were perfectly capable of doing something
2 to stick it to staff or a taxpayer if they were so
3 inclined.

4 I -- you know, it does concern me -- the
5 distribution aspect of this where it's actually
6 required, it's something that's officially noticed.

7 So, even if hypothetically I want to refute,
8 quote-unquote, something that's been taken notice of,
9 that's not going to prevent disclosure of that. Despite
10 my objection, despite my refutation.

11 MR. HELLER: That's correct. And I think -- I
12 mean, basically, the way the disclosure, though, is
13 supposed to work is essentially, you know, we outline
14 the information, but it -- like, for instance, this
15 information assuming it does -- it was not provided in
16 response to a petition or -- or in opposition to a
17 petition, and isn't contained in a brief, and isn't
18 actually disclosed on the record of an oral hearing,
19 then it's not going to be a disclosable public record.

20 But if it is -- for some reason it's now they
21 say, "I'm taking judicial notice of this," and it says
22 X" and they start reading it on the record, then it does
23 become disclosable because it's on the record of that
24 public hearing. So, it will be in the transcript.

25 And, also, if the Board Member was to move it
26 into the actual record. So, they can go ahead and ask
27 Board Proceedings to enter a document in the record and
28 then that would be included, as well.

1 MR. MICHAELS: So -- so --

2 MR. HELLER: So, those are the two ways. So,
3 just having it noticed, to the extent that it would be
4 in the transcript, that -- that may happen automatically
5 because the Board is going to have to say that they're
6 noticing something.

7 However, beyond that there's nothing -- like
8 the actual documents and things don't necessarily become
9 disclosable records. And many of them are really just
10 public documents to begin with. We wouldn't be able to
11 judicial notice many documents other than the Board's
12 own records that weren't open and available to the
13 public, because it's generally --

14 MR. AMBROSE: Well, you know, that -- that
15 brings up a -- a good point, because your definition of
16 a matter that may be judicially noticed was, you know,
17 something that was -- you know, was public knowledge or,
18 you know, something to that effect.

19 But it seems to me like that -- I mean these
20 Board records like property statements, et cetera, are
21 not, you know, matters available to the public. I mean,
22 it just -- somehow there's like a -- you know, this
23 isn't adding up to me.

24 MR. HELLER: Uh-huh.

25 MR. AMBROSE: You know, they --

26 MR. MICHAELS: In other words --

27 MR. AMBROSE: -- a property statement isn't
28 really something, according to that definition, that

1 would be judicially or officially noticed.

2 MR. MICHAELS: Or a tax return, even --

3 MR. AMBROSE: Or a tax return.

4 MR. MICHAELS: I mean, just connecting the dots
5 here, it says, "The records maintained by the Board,
6 including tax returns," the Board may take notice.

7 So, that sweeps every tax return in and then
8 below it says the Board shall distribute those tax
9 returns to the world, on request.

10 MR. KOCH: May I just say that I -- I don't
11 like that word "distribute" too much. I mean, I think
12 it ought to be "provide" or "furnish" only to the
13 parties that are involved. Distribution implies, you
14 know, you're putting it on the internet or something.
15 You're not doing that.

16 It's only the parties to the proceeding that
17 would get that.

18 But there may be a difference here, Brad, as to
19 whether or not the -- the item has been attached as an
20 exhibit. And marked --

21 MR. HELLER: There --

22 MR. KOCH: -- as evidence. At that point I
23 think it does become part of the transcript.

24 MR. HELLER: It can if it's entered into the
25 record of the oral hearing so that -- our current -- our
26 current procedures are if the Board Members move for
27 something to be entered in the record then it does
28 become a disclosable public record and part of the

1 record of the oral hearing.

2 But just because a document is out there during
3 an oral hearing, it has not been our policy of
4 considering that to become a disclosable document and it
5 doesn't get included in the record necessarily, to the
6 extent that it's not discussed on the transcript.

7 So, if the transcript shows that it's been
8 mentioned, that's all that you'll find. There's no copy
9 of that document maintained.

10 MR. KOCH: Right.

11 MR. HELLER: But I do think -- as far as all
12 this goes, I think we are making a lot of headway, and I
13 think -- Ian was just recommending that maybe what we
14 could do here would say to take out both -- both
15 paragraphs 1 and 2 out of Subdivision (d) so we're not
16 talking about the records maintained by particular
17 agencies that wouldn't normally be judicially noticed by
18 a Court. And just leave it with the same ability that
19 the Court has.

20 And then in Subdivision (e) I can take out the
21 provisions for providing copies of what's been noticed,
22 since I theoretically -- and I had some issues with this
23 when I wrote it, but it's hard to deal with -- whether
24 to do or not do something.

25 But essentially a lot of this stuff will be
26 noticed right at the hearing in some cases. So, like
27 let's say a particular Board Member says, "Hey, I saw an
28 article and it's got 'X' and I've got it right here,"

1 then, you know, I don't know that we need to have it now
2 distributed necessarily.

3 But -- but I think to the extent that that
4 distributed makes -- I shouldn't say the Board
5 distributed. I don't mind changing the word
6 "distributed." But I mean as far as requiring some
7 distribution of the noticed document does create its own
8 little problematic issues for procedural purposes.

9 But I do think if we can take out those other
10 two subdivisions then we wouldn't have the property
11 statement or anything like that, or the taxpayer's tax
12 returns or something from their file, for instance, that
13 would become part of -- of an officially noticed piece
14 of evidence, for instance. It would only be the same
15 types of things that the Courts could take judicial
16 notice of, which would generally be public information.

17 So, it probably wouldn't be to expand
18 disclosure.

19 MR. DAVIS: Brad, this is Ken Davis. The --
20 so, what you're also suggesting, though, on at least the
21 heading of this is -- or the start of it, it's really
22 the Board may on its own. So, we're -- you know, I was
23 offering up that we're talking about only at a party's
24 request.

25 MR. HELLER: Uh-huh.

26 MR. DAVIS: You're saying the Board on its own
27 may take judicial notice. So, it's something that's not
28 been introduced by a party.

1 MR. HELLER: Uh-huh.

2 MR. DAVIS: But it's going to be offered up by
3 the Board, itself?

4 MR. MICHAELS: The official notice, actually.

5 MR. HELLER: Right.

6 MR. DAVIS: Yes.

7 MR. HELLER: But I think in regards to that, I
8 don't have any problem allowing --

9 MR. DAVIS: Just so it's clarity --

10 MR. HELLER: Right.

11 MR. DAVIS: -- of what --

12 MR. HELLER: Yes. Well, my goal --

13 MR. DAVIS: -- that the Board can do things on
14 its own.

15 MR. HELLER: My goal is to retain that
16 authority in the Board or that discretion. But I don't
17 have any problem adding language that allows the parties
18 to request judicial notice -- or official notice so that
19 they're directing documents that they think are -- are
20 appropriate to be noticed.

21 But then at the same time to the extent that a
22 Board Member does have a document that he knows of -- he
23 or she, then I -- I don't intend to include any language
24 that would prevent them from noticing it unless they can
25 get a party to tell them to notice that. That's -- I
26 don't really --

27 MR. MICHAELS: Then they'd have to keep notes
28 about the whole conversation.

1 MR. HELLER: Correct. And so -- I just think
2 it creates a very odd dichotomy where a staff member of
3 the Board might know -- a Board Member staff might know
4 of a perfect document to notice and then be prohibited
5 because of some other ruling and nobody would get a
6 party to say it. Although I'd be happy to notice any
7 document or request notice.

8 MR. FOSTER: Perhaps it could say, "The Board
9 may on its own or upon the request of a party."

10 MR. HELLER: Yeah, I think that would be good.
11 So, to clar -- I do think it's important to make it
12 clear to the reader that we are also -- this is a
13 mechanism for the parties to -- to present addition --
14 or get additional evidence considered by the Board
15 Members.

16 So, that's what the -- the process of judicial
17 notice is used for in the Court system, which is
18 essentially to prevent parties from having to overcome
19 hearsay and other objections to particular evidence.

20 So that was really all staff was trying to do.
21 I think we can go ahead and make those changes to delete
22 the non-public documents so that there's no expanded
23 disclosure or concern.

24 Does that sound somewhat agreeable, Peter?

25 MR. MICHAELS: That's good. Thank you, sure.
26 Appreciate it. Thank you.

27 MR. HELLER: I think to the extent that those
28 other documents are deleted, I think the Board note

1 staff can present those as exhibits where they're
2 relevant, anyway. So -- I think the procedures we have
3 for that --

4 Go ahead.

5 MR. LO FASO: Oh, no, no, no. I'm sorry. I
6 had my hand up. I'll let you finish your sentence.

7 MR. HELLER: Oh, I was just saying -- I mean --

8 MR. LO FASO: Thank you.

9 MR. HELLER: -- there's other provisions that
10 we've discussed with regard to briefing and things that
11 would allow the parties to the extent they're relevant
12 to include a record of the Board, if it's relevant to
13 supporting a brief. And the same with the Franchise Tax
14 Board, an appeal from the Franchise Tax Board, to the
15 extent that returns and other documents related to that
16 are relevant to an appeal, they can certainly file those
17 documents, as well.

18 So there's -- I don't really think that we're
19 going to lose any evidence by deleting those provisions.
20 They just won't come in the door this way. And,
21 therefore we won't create a new disclosure window.
22 They'll just be the old process for submitting them as
23 evidence supporting something by a party, and not the
24 Board noticing it.

25 MR. LO FASO: Okay. And then -- and you're
26 getting to the -- to the question I was waiting to ask,
27 which is I'm trying to be clear on, what we lost by
28 taking out 1 and 2. And I guess I understand this

1 pretty fuzzily, is the idea that if the Board had -- if
2 the Board Member has reason to know by virtue of
3 documents the Board Member has seen that some things are
4 true that may or may not be different than things that
5 have been placed in evidence, what then can the Board
6 Member do?

7 Obviously, if the Board knows and the Board
8 doesn't have to write down the basis of the Board
9 Member's vote, the Board can make a decision on the
10 basis simply because there's nothing to prevent that
11 Board Member from doing it.

12 MR. HELLER: Absolutely.

13 MR. LO FASO: So then can the Board Member say,
14 "Well, you know, in the document that's ABC it says that
15 XYZ happened, and that contradicts what you just told
16 me," can the Board Member say this -- and alluded to
17 something that we do now that I don't follow.

18 Do you --

19 MR. HELLER: Well, let me -- let me see how I
20 can best answer that. I think -- I think we -- there's
21 a slight loss there in the sense that we're -- to the
22 extent that the document we're referring to is like a
23 record of the Board or -- or a tax return or supporting
24 document is filed with the FTB, then it -- it does sort
25 of take the -- it -- it deprives that Board Member of
26 discretion to say that they're officially noticing this
27 as evidence for the case.

28 And outside of that, it -- it's information

1 that to the extent that they would let either the
2 parties know or request additional briefing could be
3 provided through other mechanisms. But essentially
4 there wouldn't be this mechanism for saying, "I'm taking
5 official notice."

6 However, as you pointed out, there's nothing
7 prevent -- preventing them from essentially discussing
8 anything that they really want to discuss at a Board
9 hearing. There's no regulation that we've written that
10 said that that prohibits a Board Member from discussing
11 any -- anything that they consider relevant.

12 So, to the extent that they just want to start
13 discussing something or whatever, that's fine. It's
14 just different than the Board taking judicial -- or
15 official notice and just dissents that I think -- I
16 think there's just -- one would be a formal process that
17 this is the evidence that the Board is now accepting.

18 The other one says this is something that
19 someone -- that one of the Board Members recalled and
20 now wants to include it in discussion. And I think
21 it's a very formalistic distinction.

22 MR. LO FASO: And -- and I appreciate it.

23 MR. HELLER: I don't think there's a lot of
24 loss there. But --

25 MR. LO FASO: But it seems to get to the --

26 MR. HELLER: -- a tiny bit, maybe.

27 MR. LO FASO: It seems to get to the question
28 that because we have looser rules of evidence than

1 Courts of law, it's not like in a Court of law where
2 there's arguably a written decision that has to be a
3 logical sequence of the evidence, and if there's a gap
4 in the logical sequence of evidence the -- the trial
5 decision, you know, is -- is already jeopardized on
6 appeal.

7 We don't have a quite analogous situation, so
8 we don't have quite the need for the formality.

9 MR. HELLER: That's correct. And I think
10 really -- I mean, really, we're -- our real goal was
11 just to actually provide the Board with more discussion,
12 which was to just notice certain types of documents.

13 Which -- which they really could do right now.
14 There's nothing that prohibits the Board from noticing
15 something right now. It was really just designed to
16 make it clear that the Board has all the authority that
17 the Court does with regard to that kind of evidence.

18 But I don't think it was intended to -- to
19 alter their authority or their discretion in any way.
20 It was not the staff's goal here. It was really more --
21 it was really just to put everybody on notice that to
22 the extent there's an article or something out there
23 that could be noticed by a Court, that it could be
24 noticed by the Board.

25 I think if we make the changes that we're
26 talking about, that authority would still be there, and
27 the Board would still have several mechanisms available
28 to try to get those items that we might delete out of

1 paragraphs 1 and 2 to the Board.

2 And I think to the extent that it's in our
3 records, I think our staff is going to do a pretty good
4 job of getting those -- anything that we have in our
5 records that supports the -- the Board's -- the staff's
6 position, although, you know, to the extent that it was
7 something that there might be in a Board -- in the
8 Board's records that might support a taxpayer or
9 something like that, I don't know. I hopefully drew
10 them -- you know, the Department and the Appeals
11 Division and the Tax and Fee Programs Division that
12 would come to light and be provided to the taxpayers.
13 But that's the kind of thing where if it wasn't provided
14 and a Board Member knew about it, they would need some
15 kind of mechanism to get that noticed.

16 Here I'm just saying all they can do is discuss
17 it. They can bring it up. It doesn't really have a
18 major difference, as you said, because of the way the
19 decisions are rendered.

20 So, substantively, a Board Member can still
21 talk about whatever they would like to talk about
22 regarding pretty much any document at the Board meeting,
23 as opposed to the only difference would be that they're
24 just not officially taking official notice.

25 Essentially saying this is evidence as the
26 Board's considering -- it all is evidence. So, it's a
27 slightly different -- just conceptually, I think,
28 really, more than anything. So --

1 MR. LO FASO: Appreciate that.

2 MR. HELLER: So, anyway, staff is definitely
3 going to try to revise that section to incorporate all
4 those concerns. So --

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1 SECTION 5000.5015
2 WITNESSES
3 ---000---
4 MR. FOSTER: Okay, page 24, Section 5015,
5 witnesses.
6 Any comments?
7 Nothing?
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9 SECTION 5000.5017
10 PUBLIC AGENDA NOTICE
11 ---o0o---
12 MR. FOSTER: We're going to jump ahead to
13 page 29, Section 5017, Public Agenda Notice.
14 ---o0o---
15 5000.5018
16 ARRIVAL TIME
17 ---o0o---
18 MR. FOSTER: Page 30, Section 5018, arrival.
19 ---o0o---
20 SECTION 5000.5019
21 SIGN-IN
22 ---o0o---
23 MR. FOSTER: Section 5019, sign-in.
24 ---o0o---
25 MR. FOSTER: Page 32, Section 5020, conduct of
26 the Board meeting.
27 MR. EVANS: Can we back up one second?
28 MR. FOSTER: Sure.

1 MR. EVANS: Sign-in for presentation of the
2 evidence and exhibits, No. 1 says,

3 "Nine copies of evidence or exhibits should be
4 provided at the sign-in desk."

5 Can we say something that would -- if they have
6 already submitted it, you don't have to bring nine more
7 copies?

8 MR. MICHAELS: Well, here -- just above that,
9 Gary, at the beginning there is, "If evidence or
10 exhibits have not been provided previously to the
11 Board".

12 MR. HELLER: So, it would be a case where there
13 is something being provided that hasn't been provided
14 prior to that moment at sign-in.

15 MR. EVANS: Okay.

16 MR. HELLER: Now, Gary, is nine copies still
17 the correct amount?

18 MR. EVANS: Yes.

19 MR. MICHAELS: But it's ten copies of what I
20 send you?

21 MR. HELLER: Correct, ten petitions.

22 MR. MICHAELS: Ten petitions.

23 MR. HELLER: Correct.

24 MR. HUDSON: Where do we get the nine copies,
25 Gary?

26 MR. EVANS: We have five Board Members, two to
27 Appeals, one to the lawyer, you know, those guys, one to
28 us, Board Proceedings, and reporters -- two to Appeals

1 and five to the Board Members.

2 MR. HUDSON: Gary, is that still strictly
3 enforced, the nine copies thing?

4 MR. MICHAELS: Meaning what, if you don't bring
5 nine, you're --

6 MR. EVANS: If you don't bring nine, we have to
7 make copies.

8 MR. LO FASO: Well, it's a fair question, is it
9 strictly enforced?

10 MR. MICHAELS: It should -- says, "should."

11 MR. HELLER: It should say, "Shall."

12 MR. KOCH: These regulations are not rules,
13 they are guidelines.

14 MR. MICHAELS: Well, they are rules, they are
15 rules.

16 MR. LO FASO: Well, then they have to follow
17 them, that's the point I'm making.

18 MR. MICHAELS: Then should is a bit of a
19 squishy word, isn't it?

20 MR. HELLER: Right. It is a squishy word.

21 MR. KOCH: Squishy rule, that's why.

22 So, if you lose the Xerox coming off the train
23 San Diego -- I mean it happens.

24 MR. LO FASO: A squishy rule is a term or art
25 to define a rule that need not be followed?

26 MR. KOCH: No, that should be followed

27 MR. MICHAELS: It's so ambiguous it doesn't
28 mean anything.

1 MR. KOCH: It should be followed but if it's
2 not, it's not jurisdictional.

3 MR. HELLER: I like that explanation. I would
4 agree

5 MR. EVANS: To answer your question, if they
6 don't bring nine copies, we make them.

7 MR. FOSTER: Okay.

8 MR. HELLER: Squishy.

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SECTION 5000.5020

CONDUCT OF THE BOARD MEETING

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MR. FOSTER: Page 32, Section 5020, conduct of the Board Meeting.

MR. DAVIS: The one question I had is you've got -- you have removed the State Board of Equalization rules of order.

And it's just an open question of it, what will be the effect of the -- I assume, the effect of the implementation of this regulation would supercede the rules of order?

That's a question, Brad.

MR. HELLER: Well, actually, currently all of these laws supercede the rules of order right now.

And that the rules of order can not conflict with the Baley-Keene Open Meeting Act or the other ones.

MR. DAVIS: Correct.

MR. HELLER: So, there is really no change in that respect.

And, essentially, the Board of Equalization rules of order are essentially the rules adopted by the Board Members to govern themselves.

MR. MICHAELS: Are these different than the rules of practice?

MR. HELLER: These are totally different from the rules of practice.

MR. MICHAELS: Where are they?

1 MR. HELLER: And it's essentially something
2 similar to Robert's rules of order that the Board
3 Members have used in different forms from time to time
4 as they felt that it was appropriate to conduct their
5 hearings.

6 MR. HUDSON: The Board Members can hand out
7 copies of this thing to employees at some point or are
8 they hidden away somewhere?

9 MR. KAMP: Rules of order?

10 MR. HELLER: Yes.

11 MR. HUDSON: I never saw them before.

12 VOICE: They're a Board meeting reference.

13 MR. HELLER: That's different, that's a whole
14 another document.

15 There is, in fact, a third -- there's a third
16 thing, that is rules of order, and my understanding is
17 that it goes in and out of use and it is not always
18 maintained and it's generally open to the discussion of
19 the Board Members as to what it contains at the time
20 that it's invoked.

21 MR. MICHAELS: Sounds airtight.

22 MR. HELLER: So, I have received, I -- you
23 know, there are copies of it, but I don't think any of
24 them are necessarily currently adopted by the Board,
25 per se.

26 MS. OLSON: They are, the Board Meeting
27 References are right after the rules of practice.

28 Last time they --

1 MR. HELLER: The Board meeting reference?

2 MS. OLSON: The Board Meeting reference.

3 The last time they were amended was like 1996
4 or something like that.

5 MR. HELLER: But, essentially, they're just an
6 informal -- I mean they're not a regulation, they're not
7 a law, they're just informal rules that the Board
8 Members have adopted amongst themselves.

9 So, they can continue to apply them and there's
10 nothing in here that takes away the Board Members'
11 discretion.

12 Well, I should say that to the extent that
13 something would conflict with a regulation that we're
14 going to promulgate, it might be prohibited from being a
15 continued practice under the rules -- rules of order, if
16 the Board Members want to adopt and continue to use some
17 procedure like that.

18 But to the extent there was no conflict with an
19 established regulation or statute then they can
20 really -- they really have quite a broad discretion to
21 establish any rules they want to govern their
22 interaction between each other at a Board meeting.

23 And that's all those are. Staff essentially
24 deleted it because it's really not a public document,
25 really it's only between the Board Members.

26 It's not used by most people and I really feel
27 that it was misleading to start to put it out there so
28 that people will go looking for something that is very

1 difficult to obtain in the first place.

2 And these are really all of rules that somebody
3 needs to do for hearing are here. The taxpayer does not
4 need to know how the Board does a motion necessarily or
5 the specifics of how it's seconded, although that may be
6 provided in other places here.

7 There are reasons why it was deleted, just
8 essentially it's to continue to allow the Board Members
9 own document, their own rules as amongst each other.

10 So, that will continue to be out there and to
11 the extent that the Board Members want to utilize it,
12 but it's not -- it's really not being covered by these
13 regulations.

14 And the Board Members would continue to have
15 their discretion to use it.

16 MR. HUDSON: Why did you feel the need to even
17 list the three laws that you did list?

18 MR. HELLER: Well, there, I think -- it really
19 was just designed to provide some notice to individuals,
20 I think.

21 I think there has been, even amongst the Board
22 staff, there are days when it's difficult to get a room
23 of people to understand what laws apply to a Board
24 hearing.

25 MR. KAMP: Yeah, Steve Kamp.

26 I would note that it is -- you routinely hear
27 people talk about the Brown Act, but it's the
28 Bagley-Keene Open Meeting Act.

1 MR. HELLER: Exactly. So, we did think there
2 was value to this, especially with our own staff and
3 maybe even like new -- like when a new Board Member
4 comes on at the Board of Equalization to know these are
5 the laws.

6 If somebody is talking about like the Brown Act
7 or some other thing that applies to the PUC, you don't
8 see it listed here.

9 MR. KAMP: Local government is the Brown Act.

10 MR. HELLER: I understand, I wasn't -- anyway,
11 I was just referring to other types of things.

12 But, essentially, that's why we listed it, it
13 was just to provide notice.

14 And so that -- also there are some provisions
15 dealing with contribution disclosure and things like
16 that, so, we wanted to make sure that people understood
17 that this is all connected.

18 That's where that comes from.

19 MR. MICHAELS: This is where you should have
20 had all 950 of those references.

21 MR. HUDSON: Every section.

22 MR. MICHAELS: Conduct of hearing.

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SECTION 5000.5021

CALL TO ORDER

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MR. FOSTER: 5021, call to order.

Question?

MR. LO FASO: I may go into nitpicky,
prescriptive mode.

So, what means "Board Chair"? Does it mean the
standing chair? Or does it mean the individual who is
acting in the Chair at the moment?

Which is to say, the standing elected Chair,
his plane is late, does that mean the meeting can not
convene? Or may the Vice Chair convene the meeting
because for all intents and purposes he is the Chair?

MR. MICHAELS: In the absence of the Chair, the
Vice Chair is the Chair.

MR. LO FASO: It doesn't say that.

MR. HELLER: No, it doesn't.

MR. MICHAELS: Is the term "Board Chair"
defined?

MR. HELLER: It is.

MR. LO FASO: That's my question.

MR. HELLER: Alan has a good question and, no,
it doesn't definite -- the definition of Board Chair
only includes the Chair of the Board.

It doesn't specify someone who would be acting
Chair, or even the -- I think we need to make a change
there so that it's clear that the meeting can be called

1 to order even the Chair is not present.

2 MR. KAMP: Steve Kamp.

3 My next point is I think Marcy Jo should be
4 hear to answer the question, but, as I recall, and this
5 goes to your references down there as well, the Deputy
6 State Controller statute is Government Code 7.6 and/or
7 7.9, and it is a certain type of Deputy State Controller
8 that's able to sit for the Controller.

9 And I think it also should make it clear under
10 subdivision 2, the reason the Deputy State Controller
11 can not participate in these listed matters is they are
12 constitutional functions.

13 And that's -- there is an Attorney General
14 opinion that led to the creation of those two Government
15 Code Sections that I cited that lays all this out.

16 MR. MICHAELS: All good points, all true.

17 You are saying Deputy State Controller of
18 Taxation is what it is saying there?

19 MR. KAMP: Well, there's also the times where
20 Mr. Chivaro, the Chief Counsel, at one point the Chief
21 Deputy State Controller has come over here.

22 MR. MICHAELS: Right.

23 MR. KAMP: So, that needs to be -- you just
24 need to clarify all that.

25 MR. KOCH: What sections are those?

26 MR. KAMP: Government Code Sections 7.6 and
27 7.9.

28 MR. KOCH: 7.6, shouldn't they be referenced?

1 MR. KAMP: I think they should.

2 MR. MICHAELS: But, Steve Kamp, it says that
3 the State Controller may designate a Deputy State
4 Controller.

5 The Controller could send over whoever

6 MR. KAMP: Not unless -- I think those two
7 statutes actually puts some limits.

8 MR. MICHAELS: Oh, because Marcy just said
9 there were two people.

10 MR. KAMP: That's right.

11 MR. MICHAELS: Chivaro was the other one,
12 I'm sure.

13 MR. DAVIS: Yes.

14 MR. HELLER: Staff will definitely take a look
15 at those sections and try to change them.

16 MR. KAMP: There's an AG opinion that might be
17 worth referencing. You will find it cited in both of
18 them, I think.

19 MR. KOCH: I am confused over the definition of
20 redetermination.

21 Does that mean that the staff's findings are
22 being changed or the staff's recommendation is being
23 changed?

24 MR. HELLER: Well, the term "redetermination"
25 as used in here is talking about when there has been a
26 Notice of Determination issued --

27 MR. KOCH: Yeah.

28 MR. HELLER: -- and that contains staff's

1 proposed assessment and then this be would a petition
2 for redetermination, which is a request petitioning
3 that.

4 So, it's basically a request that the Board
5 redetermine the amounts that the staff has determined in
6 its Notice of Determination and, hence, that's where the
7 petition for redetermination comes from.

8 MR. KOCH: But sometimes the staff will reduce
9 the amount in the process of preparing for hearing.

10 MR. HELLER: That's correct.

11 MR. KOCH: Now is that then the Board
12 redetermines, based upon that?

13 Or what does it mean when they say, "Move to
14 redetermine."?

15 That's what I'm trying to focus on.

16 MR. HELLER: Well, move to redetermine --

17 MR. MICHAELS: Who wins?

18 MR. HELLER: Depends on the language that
19 follows that.

20 It depends. They can redetermine based on --
21 they can redetermine as staff recommends, I think in
22 most of those cases they're really referring to the
23 Appeals Division recommendation, not to the audit
24 department's original assessment, because most of the
25 time they're looking at as approving what the Appeals
26 Division has recommended in their hearing summary.

27 MR. HUDSON: I wish they'd just say that.

28 MR. KOCH: But it's --

1 MR. HELLER: Right.

2 MR. KOCH: -- very confusing because the
3 redetermine -- the petition for redetermination opposes
4 any deficiency.

5 MR. HELLER: Right.

6 MR. KOCH: So, when they say, "Move to
7 redetermine," I mean who -- what are they moving for?

8 So, I don't know what to say about that except
9 that maybe that's in those rules of order.

10 MR. FOSTER: On occasion I've heard them say,
11 "Move to redetermine," on an income tax, which has --

12 MR. HELLER: No determination whatsoever.

13 MR. MICHAELS: You've been saving up that
14 question for 20 years.

15 MR. KOCH: No no, no. I haven't been around as
16 long as you have.

17 MR. HELLER: I think it's something that we can
18 work on as far as terminology goes.

19 There's a lot of archaic terminology that the
20 Board uses that we're trying to filter out where we can.

21 And as one example, in Part 2, during the
22 business taxes, we did take out the term "late protest."
23 It is now gone and it's now "administrative protest,"
24 which --

25 MR. MICHAELS: What was the old term?

26 MR. HELLER: It was late protest.

27 MR. KOCH: Late protest.

28 MR. HELLER: Which admittedly didn't have --

1 you wouldn't think it was so archaic or anything, but
2 apparently it applied to early petitions. So, you
3 wouldn't necessarily -- you might file something early
4 and have it treated as a late protest, because the late
5 protest terminology was created before early petitions
6 were treated as a protest.

7 So, we're trying weed those out where we can,
8 so, we appreciate any help.

9 (Multiple speakers -- unintelligible.)

10 MR. HELLER: So, please feel free to point any
11 ones as we go forward, even if you see them after this
12 meeting as we go forward, go ahead and let me know.

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SECTION 5000.5022
ORDER OF BUSINESS AND
TIME ALLOCATION FOR ORAL HEARINGS

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MR. FOSTER: Section 5022, order of business
and time allocation, begins on page 33.

MR. HELLER: Moving ahead, no comments.

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SECTION 5000.5022.1

PUBLIC COMMENTS

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MR. HELLER: Moving on to Section 5000.5022.1,
on page 35, public comment.

MR. MICHAELS: Hang on, public comment.

I have't read this through all of the way, but
last time the Board met, it struck me that a public
comment was made during a hearing, basically.

It used to be the case that there were -- there
was time carved out at the very, very beginning for
people who weren't on the agenda, just like they do at
Board of Supervisors and City Council meetings and if
someone out in the public wants to get up and say
something, they're afforded an opportunity.

Some City Councils or Boards of Supervisors
afford the public an opportunity to speak at the very
end of the meeting.

But, it's kind of unusual to let someone throw
their three minutes in right during a case.

1 MR. EVANS: It's not during the case, it's
2 before the case actually begins, theoretically speaking.

3 MR. MICHAELS: Sorry, I don't mean to mock you,
4 but I mean, the guy was -- you look at the transcript,
5 you wouldn't know --

6 MR. EVANS: Yeah.

7 MR. MICHAELS: -- he's not really part of this
8 case, even though he's being asked questions, he's
9 testifying, he's making statements, he's disagreeing
10 with what the other side is saying.

11 MS. CROCETTE: Hi, this is Sabina.

12 Gary, I have a question about that one in
13 particular -- not to justify any of that, because I
14 agree it was very unusual.

15 Wasn't that a situation where there was some
16 issue about them not responding to the Notice for
17 Hearing, then we put them on the consent calendar or
18 something of that nature?

19 Was that that case?

20 MR. EVANS: No, this was --

21 MR. SHAH: An income tax case?

22 MR. EVANS: This was an income tax case where
23 you allow general -- no, that was Mercury.

24 This was a nonappearance calendar and it was
25 like an H. R. A. and there was like a hundred people on
26 this particular appeal. And this -- I am going to say
27 representative, because I don't know what he really
28 was -- thought that it was a hearing and not a

1 nonappearance matter. That's why he was there.

2 MR. SHAH: Peter mentioned three minutes, is
3 that supposed be in there?

4 MR. EVANS: The three minutes is not actually
5 stated in the proposed regulation.

6 MR. HELLER: It's not.

7 MR. EVANS: That's just a standard that we're
8 using with this Board Chair.

9 MR. SHAH: It could more?

10 MR. EVANS: Could be less.

11 MR. HELLER: It's just that the Bagley-Keene
12 Opening Meeting Act allows the public to appear and make
13 comments.

14 It doesn't specify a particular length of time.
15 And the Board staff hasn't tried to incorporate a formal
16 time length into this regulation, more as a concern that
17 we didn't want to -- even we said three minutes, we
18 don't want to encourage people to use the entire three
19 minutes if, in fact, they can get done in a minute.

20 MR. EVANS: And, as a practice, we've allowed
21 these people to speak at the beginning of the item in
22 which they want to speak to, versus, as Peter says, at
23 the beginning of -- at the beginning of meeting there is
24 time allocated for public comment.

25 And if all of the public comment is not handled
26 during that time period, then more time could be set
27 aside at the end of the meeting.

28 So, that's also a possibility. But as a matter

1 of practice, we don't do it that way.

2 MR. MICHAELS: Is it just, I guess,
3 presumptuous or inappropriate for staff, if you will, or
4 for this group here to be considering inclusion of
5 some -- some verbiage in here that says that the matter
6 gets -- if you have got public comment it's at the
7 beginning or the end, but not in the middle -- I mean
8 not during the case?

9 I don't know if that's out of bounds for us.

10 MR. HELLER: I can certainly assure the comment
11 and consider it.

12 I don't think -- at this point I would say I
13 have any reason to --

14 MR. MICHAELS: It's an invitation to chaos at a
15 certain level.

16 I mean just thinking back, there have been a
17 number of instances where people have signed up and
18 where there has been a lot of, you know, backstage
19 jockeying and positioning for exactly when they're going
20 to make their comment for the most effect or to
21 neutralized whoever else, you know.

22 Maybe to prevent manipulation and opportunism
23 if there was a hard and fast policy, you know, there's a
24 period for public comment at the very beginning, there
25 is a period for public comment at the very end, we're
26 open to the public. We respect all of the rules.

27 But once the actual hearings start, that is not
28 the time for public comment.

1 MR. HELLER: Well, we'll definitely consider
2 that. I think from what I'm hearing, most people
3 consider it irregular to not have comments at the
4 beginning of the hearing.

5 So, I don't think it's -- would be contrary to
6 our general policy, but staff just needs to consider it
7 as far as, you know, it would be -- would,
8 theoretically, restrict the Board Members' discretion to
9 the extent that a Chair or one of the Board Members did
10 want comments to come at end of the hearing or something
11 like that.

12 I do agree with you, though, that there is
13 reasons why, both for efficiency and also for notice of
14 the parties who are now about to argue the case that
15 there is good reason to have it at the beginning, but --

16 MR. MICHAELS: Fairness, I mean, someone I
17 really stack the deck and get twenty people to sign up
18 to get three minutes of public comment in the middle of
19 the hearing and really change things radically.

20 MR. HELLER: Oh, absolutely. And I don't
21 think -- I mean, right now, there's nothing here
22 allowing someone to show up and demand that they're
23 going to comment in between parties, or at this point
24 they're really -- as far as I can tell, based on the
25 Bagley-Keene Open Meeting Act, and the language of this
26 regulation, that as long as the Board is providing an
27 opportunity for them to comment, then that's all that's
28 required and they really have no right to demand that

1 they comment last or third or anything in that.

2 So, I think Board Proceedings and the Board
3 Chair could probably handle them it's currently set out,
4 but I think staff might definitely consider something
5 like, "generally provided," it says, "Generally comments
6 will be presented prior to the hearing," or something to
7 that effect.

8 So -- because I'm very concerned that to the
9 extent we get the odd case where it would be appropriate
10 or the Chair certainly thinks it's appropriate to have
11 comment come later, I'm concerned with not restricting
12 the Chair or the other Board Members' discretion to be
13 able to say, "You know I want to hear from him and then
14 I want to hear the comment. Then I want to hear from
15 him about that comment."

16 There could be the rare case where that's
17 really the most appropriate way to proceed and I don't
18 want to go further and bind them.

19 But I think it might be good to point out, for
20 even the people who are appearing that they'll generally
21 be asked to speak beforehand. I think that might be of
22 some benefit for these people who are appearing to
23 comment as well so they know when they need to be
24 available.

25 So, anyway, we definitely will take the comment
26 consideration. I am just not positive what I'll be able
27 to do, but I'll definitely try to do something and we'll
28 consider the issue.

1 MR. LO FASO: Let me just offer one more
2 innocent example for discretion.

3 Somebody wants to make a comment at the
4 beginning of the hearing and their plane was delayed and
5 they can't come until later in day, you wouldn't want to
6 not let them comment.

7 MR. HELLER: I think that's good.

8 MR. MICHAELS: That's fine, at the very
9 beginning or at the very end.

10 MR. EVANS: You can always open up the
11 comments, as you mentioned, at the very beginning or the
12 very end.

13 The concern that could be raised is that the
14 person making a comment, a public comment, that what
15 they're commenting on has already been voted on.

16 MR. MICHAELS: That happens all the time in
17 City Councils and Boards of Supervisors.

18 MR. EVANS: Okay.

19 MR. MICHAELS: That doesn't necessarily make it
20 right, but I mean, it does happen all the time, and
21 given the alternative of possibly disrupting and -- in a
22 way that's adverse to one or both of the parties, having
23 someone come barging in and disrupt the proceedings,
24 seems to me -- it seems more orderly for there to be
25 structure.

26 And, you know, someone who's coming in somewhat
27 impulsively to make a public comment, right, I mean that
28 they're making a public comment because they have,

1 theoretically, recently -- like too recently to notify
2 the Board in advance -- gotten interested in saying
3 something.

4 So, I feel less -- yeah, those people must be
5 heard, but I feel less sensitive about compromising the
6 sort of Johnny come lately types, if they speak at the
7 very end, well, those are the breaks.

8 You know, you kind of caught on to it at the
9 last minute, you showed up at the last minute and you
10 get to be heard at the last minute, but you will be
11 heard.

12 MR. EVANS: I think think typically where we
13 may put ourselves in a box here is that we will, for
14 State assessees coming up, we say, okay, send us -- send
15 us something and send us your name so you can -- because
16 you want to speak.

17 MR. MICHAELS: Yeah.

18 MR. EVANS: So --

19 MR. MICHAELS: And a list of all the people you
20 are speaking on behalf of.

21 MR. EVANS: Right. Then we'll have Chief
22 Counsel matters or rulemaking matters where we say,
23 okay, if you have an -- if you want to speak to this
24 issue, please do so.

25 So, we put those at the beginning of those
26 items. So, I think that we get caught up in that. When
27 somebody wants to speak to a case oral, an hearing or
28 nonappearance matter, that we also put them in front of

1 that category.

2 So, it's a box that we put ourselves in -- and
3 using the term "box" loosely here, but it's something
4 that we have -- this is our -- this is how we developed,
5 so --

6 MR. MICHAELS: Okay, well, Brad has
7 acknowledged that he understands the concern and he'll
8 do the best he can.

9 MR. EVANS: We walked into it and we can walk
10 out of it.

11 MR. HELLER: There is no -- I think we did beat
12 this horse a little bit, but I think -- I'll definitely
13 consider the comment and see what we can do to make it
14 more clear.

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SECTION 5000.5022.2

BURDEN OF PROOF

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MR. HELLER: Section 5000.5022.2, on page 35,
burden of proof.

No comments on Section 5022.2.

---o00---

SECTION 5000.5023

QUORUM

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MR. HELLER: Moving to 5000.50023 on page 36,
quorum.

Also, just to let everyone know, Miss Mandel
also gave me a comment, similar to the earlier one
regarding specifying the Deputy Controller so, I'm
taking a look at that and making sure that it
coordinates with the language that we're going to be
putting into Section 5021 as well.

They should generally -- maybe not exactly
mirror each other, but should be very similar.

Are there any comments on Section 5023?

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SECTION 5000.5024
VOTING AND DECISIONS

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MR. HELLER: Section 5000.5024, is on the
bottom of page 36, voting and decisions.

MR. MICHAELS: Yeah, this has always been a pet
peeve of mine. The statute actually says that taxpayers
are entitled to a decision. And a tie is not a
decision. A tie is a tie.

Does this cover that? Does this address it?
Here it says,

"A quorum is required for all affirmative
decisions or actions of the Board."

So, is --

MR. HELLER: Well --

MR. MICHAELS: What's tie? Is that an
affirmative decision?

MR. LO FASO: I would say it's lacking -- it's
not decided.

They may decide. They have tied and
collectively they have not decided.

MR. MICHAELS: That's not a decision then. As
you just said, they have not --

MR. LO FASO: Then I don't know how you enforce
your --

MR. HELLER: I'm sorry, Al.

MR. LO FASO: No, no, please.

MR. HELLER: This is -- it's a contentious

1 issue, but essentially the language was designed to make
2 it clear.

3 MR. MICHAELS: What does it say? Maybe read
4 it.

5 MR. HELLER: This was our intention and it
6 says, I'll read it. It says,

7 "A majority of the quorum is required for all
8 affirmative decisions or actions of the Board."
9 Did you need another copy?

10 MR. MICHAELS: No, I'm sorry, I was thinking of
11 what the law says.

12 MR. HELLER: Okay.

13 So, we added the word "affirmative" and this
14 was to deal with this issue, but essentially, in order
15 for there to be an affirmative decision, for the Board
16 Members to be directing staff to change something or
17 directing us in a specific way, they do need to have a
18 majority vote.

19 But, the reason the word "affirmative" is there
20 is because sometimes when Board votes and does not reach
21 an affirmative decision to direct staff to do something
22 else, by default -- this has been the opinion of the
23 Legal Department for a quite a while -- that does result
24 in a decision, just not an affirmative decision to
25 change direction, but a decision, essentially, to
26 maintain the status quo.

27 And that was why the word "affirmative" was
28 added was that essentially in order to maintain the

1 status quo under some circumstances there does not need
2 to be -- there could be a tie vote where there is just
3 no majority reached to do anything and in that case
4 there would still -- there still would be direction to
5 the staff by the fact that there was no majority
6 reached.

7 MR. MICHAELS: So, does "affirmative" suggest
8 there are neutral decisions or negative decisions?

9 MR. HELLER: Well, "affirmative" really
10 contemplates, and I think it's probably what you're
11 concerned with, but, essentially, the situation with the
12 State assessee where the the Board can not reach an
13 affirmative decision to set the value and, therefore,
14 let's the value stand.

15 MR. MICHAELS: And that's not a decision?

16 MR. HELLER: That's -- the Legal Department
17 believes that's decision and we just put in the word
18 "affirmative" to make it clear that particular type is
19 not being --

20 MR. MICHAELS: It's not -- it's a tie.

21 In boxing a draw is a a no decision.

22 MR. HELLER: we're not boxing.

23 MR. MICHAELS: In this --

24 MR. LO FASO: It says --

25 MR. AMBROSE: It says, "If a majority vote is
26 required for a 'decision,' then the tie," you know a tie
27 is not a majority vote, right?

28 So, the motion is whether to grant the petition

1 or request for relief or whatever, so, in order to
2 decide that, you know, in favor of the petitioner, they
3 need a majority. They need three votes

4 MR. MICHAELS: I will double check the rule,
5 unless you have it there, but you know what I am talking
6 about, the statute?

7 I don't know that the word "majority" is in
8 there, I think --

9 MR. HELLER: Just says decide.

10 MR. MICHAELS: "The Board shall decide."

11 MR. AMBROSE: Right.

12 MR. EVANS: Does it say --

13 MR. MICHAELS: I better look, I don't want to
14 make anything up.

15 MR. EVANS: Does it say today?

16 MR. MICHAELS: Shall decide today?

17 No, no.

18 MR. EVANS: They could take make the --

19 MR. MICHAELS: They could postpone it, exactly.

20 MR. EVANS: -- tie and bring it back next week.

21 MR. MICHAELS: Again, you know, in the State
22 assessee context, that's why we had to meet at LAX that
23 time because Gray Davis was -- the only way that he was
24 going to be available to break a tie was between
25 flights, okay.

26 And, of course, when he realized his vote was
27 the tie breaking vote, he left and so there was no
28 decision.

1 MR. HELLER: Sounds like Gray.

2 MR. LO FASO: In another context we established
3 that the May value goes on the rolls. So, if you don't
4 change it, the one that went on the roll from May is the
5 decision, it goes on the roll.

6 MR. HUDSON: It was voted by the Board.

7 MR. HELLER: I think, just to kind of wrap it
8 up, I think the Legal Department has taken the same
9 interpretation or similar to what you just stated, Alan,
10 and similar to what Lou expressed as well.

11 And there is some contention over over that
12 interpretation and that's what Peter is expressing right
13 now.

14 I just want to say we put the word
15 "affirmative" in to try to make that clear. But as far
16 as staff reconsidering whether or not the Board has made
17 a decision in these types of property tax matters, I
18 don't think we're going to be able to -- to change the
19 Board's policy on whether a decision is rendered in
20 those situations.

21 MR. MICHAELS: I mean it's not really -- I
22 guess it's Tim Boyer's policy, really.

23 MR. HELLER: Something like that. It's a Legal
24 Department policy, I think.

25 And far as -- as far as the way that this
26 regulation is going forward, I don't believe that we're
27 going to be able to go ahead and --

28 MR. MICHAELS: Okay.

1 MR. HELLER: -- have a full discussion of
2 whether the Board should change or the Legal Department
3 and the Board should change on whether a decision's been
4 rendered or not in that set of circumstances.

5 MR. MICHAELS: Fair enough.

6 MR. HELLER: So, we're hoping that this at
7 least makes it clear that there is -- for certain people
8 there is a potential that there could be a decision out
9 there, where there was an affirmative vote.

10 That was our goal, really, just to make that
11 clear that to the extent that this scenario plays out,
12 and according to the Legal Department's interpretation
13 that, in fact, there is a decision, but without an
14 affirmative vote of a majority of the quorum, this
15 language makes it clear -- or basically indicates that
16 what -- wouldn't prevent that from being considered a
17 decision, the way I read it.

18 It doesn't define that type of default decision
19 that's out of the regulation.

20 MR. AMBROSE: Even before Boyer, they -- what
21 would happen with a tie?

22 MR. MICHAELS: Well, I wrote to him a couple of
23 years ago because, you know, we had a 2-2 split and the
24 controller didn't show up and so we were stuck.

25 MR. AMBROSE: right.

26 MR. MICHAELS: And, you know, I quoted the
27 statute -- I can dig up the letter, I have it -- but
28 Boyer wrote -- I said, .

1 "We're entitled to a decision. It says shall
2 decide. Nothing was decided it was a 2-2. We
3 didn't lose; we didn't win; there was no
4 decision. It was a tie."
5 He wrote back and said, "You're wrong."
6 MR. AMBROSE: Okay, but that's when it was put
7 in writing?
8 MR. MICHAELS: Yeah.
9 Do you remember, Steve?
10 MR. LO FASO: Well, in the US Supreme Court a
11 4-4 decision it means it is affirmed and that's the
12 decision of the court.
13 MR. HELLER: That's true.
14 Anyhow, we're going to --
15 MR. MICHAELS: It says, "shall decide".
16 MR. KAMP: But the US Supreme Court, when they
17 have a 4-4 decision, that is a decision.
18 It doesn't stand as precedent, but it did
19 decide and conclude the matter that's wound its way up
20 through two prior courts, it's affirmed.
21 MR. MICHAELS: I tell you what, we've beaten it
22 dead enough and we're not going to change this anyway
23 through this rulemaking process.
24 So, I guess we should move on and I will put it
25 in my letter.
26 MR. HELLER: Excellent. I'm making a note of
27 it now and I would appreciate a letter to me later as
28 well.

1 MR. HELLER: So I'm going to move ahead now
2 from Section 5024.

3 And I also point out that staff is still
4 considering revising these sections just in general
5 that -- in any areas that it can to -- to try to
6 maintain the Board's discretion as to the matter of
7 motions and --

8 MR. KOCH: One question about the last
9 discussion. If the -- there are only four Members
10 present --

11 MR. HELLER: Uh-huh.

12 MR. KOCH: -- can an absent Member be brought
13 back and -- and break the tie?

14 MR. FOSTER: Sure.

15 MR. HELLER: An absent member can if the --

16 MR. KOCH: Even if they haven't heard --

17 MR. HELLER: Sure.

18 MR. KOCH: -- the hearing?

19 MR. HELLER: The roll is left open so they
20 could still vote on that matter.

21 MR. MICHAELS: It happens all the time. That's
22 how the Controller -- the Controller is never there
23 except to break ties.

24 MR. HELLER: That's correct.

25 MR. MICHAELS: Or historically wasn't.

26 MR. EVANS: As long as the Member's been
27 briefed or properly informed about what went on at the
28 hearing. So if they get a transcript and/or a audio of

1 the -- of the hearing.

2 MR. KOCH: Yeah.

3 MR. HELLER: Correct.

4 Yeah, I think -- just to round it out, the only
5 times we end up with this kind of no decision or a
6 decision -- a split decision that ends up as a decision,
7 it's because of time constraints and the Board can't go
8 ahead and keep the roll open and let that other Member
9 show up and vote later.

10 MR. MICHAELS: No. We can't -- I mean this
11 December 31st is a drop dead date. And if the State
12 Controller doesn't show up, for whatever reason, tough
13 luck.

14 MR. HELLER: Absolutely. That's correct.
15 Okay.

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ARTICLE 7

POST HEARING

SECTION 5000.5026

NOTICE OF BOARD DECISION

MR. HELLER: Moving ahead, now I'm on to page 39, Post Hearing -- or Article 7, Post Hearing. And I'm starting with Section 5000.5026, Notice of Board Decision.

MR. MICHAELS: The California Court of Appeal, by the way there at the top of page 39, would that be yes?

MR. HELLER: Thank you, Peter.

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SECTION 5000.5027

PETITION FOR REHEARING

MR. HELLER: Looking ahead. Section 5000.5027,
on page 41, Petition for Rehearing.

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MR. HELLER: Move ahead. Section 5000.5028.
On the bottom of page 42. Recommendation on Petition --
Oh, go ahead, Al.

MR. KOCH: I'm -- I'm a little bit behind here.
Back on the memorandum opinion.

MR. HELLER: Memorandum opinion.

MR. KOCH: If a memorandum opinion --

MR. MICHAELS: Where is that?

MR. KOCH: This is on page 38. If a
memorandum -- it says, "If a memorandum opinion is
presented to the Board for adoption as a non-appearance
matter," that's kind of a backhand way of describing --
what is the process for getting a memorandum opinion, I
guess is the question.

MR. HELLER: Uh-huh.

MR. KOCH: Does the -- does the proponent of
that have to request it at the time of the hearing? Or
subsequent?

MR. HELLER: Well, generally speaking, and I'm
just going back through this section, but section -- I'm
in the same section, it's 5024, Subdivision (d),
paragraph 5 deals with the motions to prepare a
memorandum opinion. And essentially it requires a Board

1 Member to make a motion to have one prepared.

2 MR. KOCH: I missed that, I'm sorry.

3 MR. HELLER: Oh, that's okay.

4 MR. HELLER: And it doesn't -- it doesn't
5 expressly provide for requests for an opinion from the
6 parties.

7 MR. KOCH: Right.

8 MR. HELLER: Outside of I think it does
9 allow the Appeals Division to recommend the publication
10 of an opinion in its hearing summaries, in other --
11 other parts of the rules, not Part 5.

12 But, essentially, a party could always ask the
13 Board or request it and it would just be up to the Board
14 Members if they want to make a motion.

15 MR. KOCH: Okay.

16 MR. HELLER: So, it doesn't prohibit a party
17 from requesting it.

18 MR. KOCH: Yes.

19 MR. HELLER: And then so also going back to (e)
20 where you were just making your other comment,
21 essentially what would happen if they request one to be
22 prepared, it generally is prepared by our Appeals
23 Division. The Appeals Division then submits that --
24 that -- that formal opinion to the Board Members as a
25 non-appearance matter so that they can then consider it
26 and adopt it, because it's not their decision until it's
27 adopted.

28 And then this is -- essentially what this

1 Subdivision (e) is talking about is if this -- this
2 happens so we get to the level where we're at the
3 non-appearance calendar, and there's now a formal
4 opinion being submitted, that's when a dissenting or
5 concurring Board Member could go ahead and request a
6 dissenting or concurring opinion be included with the
7 majority opinion.

8 MR. KOCH: Now it's not said that that -- that
9 this such a memorandum opinion has precedential effect,
10 but does it?

11 MR. HELLER: Yes, it would have it. And that's
12 all of our formal opinions have precedential effect and
13 I definitely put something to that effect into the
14 regulations, as well.

15 MR. KOCH: Okay.

16 MR. HELLER: Are we doing okay so we can push
17 through to the end or --

18 HEARING REPORTER: Yes.

19 MR. HELLER: Okay, I just want to make sure.

20 Perfect. Okay. I'm going to go back up to --
21 I think we were on Petition for Rehearing, is that
22 correct?

23 MR. MICHAELS: Yeah.

24 MR. HELLER: Okay, we're going back to page 41,
25 Section 5000.5027. This is the Petition for Rehearing.

26 MR. HUDSON: I guess I got to keep saying this
27 every time because I haven't seen any language yet
28 despite all our prior interested parties meetings. We

1 are saying that a petition for rehearing can be mailed
2 or it then says "hand-delivered." And we've talked
3 previously about e-mailing, that kind of thing.

4 MR. HELLER: Correct.

5 MR. HUDSON: And even some detailed language
6 about that. Is there -- what -- what's the update on
7 that?

8 MR. HELLER: The detailed language that has
9 been provided to the Board Members is in -- going to be
10 incorporated. It's in -- it's currently incorporated to
11 the versions of Parts 1 and 2 that we're scheduling to
12 be presented to the Board on the 18th. So, it is
13 incorporated in there.

14 This draft came out before we were able to
15 finalize it and make the executive decisions about
16 whether or not -- what format it would take. So, we
17 felt like staff would be better -- use their time better
18 by not putting in a third possible potential alternative
19 to e-filing in here. That might also get changed in
20 the -- the week or two even after revision.

21 So we're definitely planning -- assuming the
22 Board Members consider the language that's presented to
23 them on the 18th as satisfactory, and also the
24 accompanying instructions we intend to post on the
25 website, then -- then we will go ahead and incorporate
26 them into all the different -- all the different
27 chapters so that all the programs can utilize the same
28 e-filing procedures.

1 And we are trying to make them uniform
2 throughout all the programs so there's not any kind of
3 confusion. Although there might be different addresses
4 to send these to.

5 Are there any other comments on Section
6 5000.5027?

7 MR. AMBROSE: I -- I have a comment about just
8 a couple of -- one, I guess it's grammatical. The first
9 sentence, it says, "The taxpayer of the matter subject
10 to the provisions" da-da, "within 30 days of when the
11 official notice of Board action is mailed." You might
12 want to make it within 30 days of the date.

13 MR. HUDSON: The official notice

14 MR. HELLER: The date. Okay.

15 MR. AMBROSE: And then in the next sentence --

16 MR. MICHAELS: It looks like it did say that,
17 Lou, and they crossed it out. Why did they cross it
18 out? Do you know?

19 MR. HELLER: Well, it was actually the -- it
20 was the date of the Board's decision and not the date of
21 the mailing. So, there's -- it's kind of a slight
22 difference.

23 MR. HUDSON: It's where -- where that is
24 significant, though, is I've actually had a circumstance
25 where a taxpayer got the -- you know, were calling us
26 three weeks later and they hadn't gotten anything yet.
27 And they were saying, "What happened?"

28 And I was telling them on the phone what the

1 decision was, and they still only have 30 days. And
2 that's why they --

3 MR. AMBROSE: And then in the next sentence it
4 should be "affect" instead of "effect".

5 MR. HELLER: Affect. Thank you. Okay.
6 Are there any other comments on Section ?

7 MR. KOCH: How about a change in the law.

8 MR. HELLER: A change in the law.

9 MR. KOCH: Yeah. I mean, it's not specified as
10 a -- as a -- one of the general circumstances under
11 which a petition could be granted.

12 MR. HELLER: Okay.

13 MR. MICHAELS: A retroactive change in the law.

14 MR. KOCH: Yeah.

15 MR. MICHAELS: Like what? Like a statute
16 that's retro?

17 MR. KOCH: A Court decision.

18 MR. MICHAELS: A Court decision.

19 MR. HUDSON: Like when Judges are writing it.

20 MR. HELLER: Okay. So, Al, are you suggesting
21 that we add that as one of the grounds in Subdivision
22 (b), is that what you're saying? Or --

23 MR. KOCH: Yeah, or maybe it should be broader
24 than that. Maybe it should be any legal ground that
25 could not have been previously submitted by -- under an
26 exercise of due care.

27 MR. MICHAELS: But this would be within 30
28 days, right? Still -- your Court --

1 MR. KOCH: Oh, yeah.

2 MR. MICHAELS: All bets are off after 30 days.

3 MR. KOCH: Yeah.

4 MR. HELLER: Okay. I'll make a note of that.

5 I think our current ones all came from a case
6 called Wilson Development. And I think, though, the
7 Board's -- the Board generally -- oh, no. I'll just
8 have to definitely consider it and see if we can come up
9 with a recommendation that -- that might expand it in a
10 way that still has some -- that's clear enough to be
11 applied.

12 As opposed -- I think changing the law is
13 definitely something we might be able to do. The other
14 part I'll have to work on later.

15 MR. KOCH: Yeah.

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SECTION 5000.5028

RECOMMENDATION ON PETITION FOR REHEARING

MR. HELLER: Okay. Moving ahead to Section
5000.5028 --

MR. MICHAELS: Everybody stops at a quarter to
5:00.

MR. HELLER: On -- yes, on page 42,
Recommendation on Petition for Rehearing.

MR. KAMP: Steve Kamp on Subdivision (b). "The
recommendation on petition for rehearing shall be
submitted to the Board for adoption as a non-appearance
matter." I would use the word "consideration" because
that implies that the Board is going to adopt --

MR. HELLER: Okay.

MR. KAMP: -- whatever is submitted.

In fact, I would suggest that you look for
other situations like that, because I recall a prior
meeting we had an issue with something like that.

MR. HELLER: Okay.

Any other comments on Section 5028?

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SECTION 5000.5029

REHEARINGS

MR. HELLER: Okay. Moving ahead, I'm going to section 5000.5029, Rehearings. It begins on the bottom of page 43.

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SECTION 5000.5031

MAILING ADDRESS

MR. HELLER: Moving ahead. Now on Section 5000.5031 on page 44. And, once again, this will also be amended to provide for electronic filing, as well, as soon as we have proof language.

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SECTION 5000.5032

TIMELINESS OF DOCUMENTS

MR. HELLER: Okay. Going to move ahead.
Section 5000.5032 on page 45, Timeliness of Documents.

MR. MICHAELS: Now, it says here on (c), I haven't cross-checked this, but it says "shall be timely if it is mailed to". And then there's also a definition for delivery service or whatever you call that term of art.

So, I mean I send mine by U. S. Postal Service. Some people actually send things by FedEx or UPS. Is that mailed, too, if it's sent by FedEx?

MR. HELLER: Yes.

MR. MICHAELS: It's mailed?

MR. HELLER: Yes. Uh-huh.

MR. MICHAELS: It's not mail.

MR. HELLER: Would you prefer -- I don't know, let me see.

MR. HUDSON: This raises that issue -- I'm hoping you already have it ready to cross-reference for, you know, electronic delivery by or --

MR. KAMP: Steve Kamp. Do we have in the general definitions a definition of mailing that would perhaps include these non-postal delivery services? Because I think the -- the Code of Civil Procedure allows -- you know now allows the delivery by means other than the U. S. Postal Service.

MR. MICHAELS: You know, actually, large -- I

1 could be mistaken, but isn't -- it's the postmark, it's
2 not the delivery date. It's the postmark date that
3 matters. Which is why I don't use FedEx, because it
4 doesn't matter when it gets here, it just matters when
5 it, you know, gets stamped.

6 MR. AMBROSE: Well, this gives you the
7 alternative, a postmark date, if it's mailed by the U.
8 S. Postal Service or the date that you bring it to FedEx
9 to be mailed.

10 MR. MICHAELS: Where -- where is that part that
11 they bring it to Fedex?

12 MR. AMBROSE: (b).

13 MR. MICHAELS: In where?

14 MR. AMBROSE: (b).

15 MR. MICHAELS: (b). In the absence of other
16 evidence, the postmark date or the date of delivery to
17 the delivery service -- okay, that's -- I think that
18 covers it.

19 MR. AMBROSE: Or put it in the box, I guess --

20 MR. MICHAELS: Yeah. I didn't even read that.
21 That's fine.

22 MR. HELLER: Okay. However, we also will
23 consider creating a definition for "mailing" and taking
24 into account possibly defining e-filing as being
25 included within that term

26 MR. MICHAELS: I don't -- I don't know, maybe
27 even the word "mailed" is outdated like "dialing" is
28 outdated. Maybe you want to say "transmitted" or

1 something. Filed or some such.

2 MR. HELLER: Yes.

3 I think we'll consider a lot of alternatives
4 for that and -- I think the main key, though, will be
5 creating the definitions that makes sense as opposed to
6 what term you want to define.

7 So -- but it definitely will be something to
8 the effect of mail transmitted or sent or something to
9 that. Filed is also possible. I think we just want to
10 make sure that it includes all the mechanisms that the
11 Board accepts, which is a pretty broad group of devices
12 for mailing. Okay.

13 Any other -- any comments on Section 5032?

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SECTION 5000.5033

PUBLIC RECORDS

MR. HELLER: Okay. Okay, with that I'm going to skip over Sections 5033, both alternatives which we have previously discussed. And that really just leaves us with --

MR. EVANS: What about 5033?

MR. HELLER: 5033, first alternative?

MR. EVANS: Yeah.

MR. HELLER: We discussed that.

MR. MICHAELS: We already did it.

MR. HELLER: That was the first thing we did this morning -- no, it was the second thing.

MR. EVANS: We did that section this morning?

MR. MICHAELS: Yeah, we already did it.

MR. HELLER: Yeah, we did both alternatives for --

MR. EVANS: I -- I did have a couple of questions.

MR. DAVIS: Public comment is closed.

MR. HELLER: Go ahead.

MR. MICHAELS: No, he can make his comment at the end.

MR. DAVIS: At the end.

MR. HELLER: Okay. Transcripts.

MR. EVANS: Transcripts, number 6.

MR. HELLER: Okay, 6.

MR. EVANS: It says retained after 12 years

1 MR. HELLER: Uh-huh.

2 MR. EVANS: The CSR Board only requires seven.

3 MR. HELLER: Okay.

4 Is that what we do or -- do you have any idea
5 what we do now?

6 MR. EVANS: We do ten now.

7 MS. OLSON: We -- we did 12 here and that was
8 set by Chief Counsel.

9 MR. HELLER: Okay.

10 MS. OLSON: That's -- I mean, that's the only
11 reason for it. It was a determination based by Chief
12 Counsel to go for 12 years.

13 MR. MICHAELS: 12 years. So the --

14 MR. HELLER: So, we better stop doing 10.

15 MR. MICHAELS: The Sherman era is officially
16 over.

17 MR. HELLER: I was kidding.

18 MR. MICHAELS: 12 years.

19 MR. HELLER: Okay.

20 MR. KAMP: Not quite, if it's 12 years.

21 MR. MICHAELS: All right. A few weeks.

22 MR. HELLER: Perfect.

23 Okay, with that I'll definitely take a note of
24 that and check to make sure that it reflects our current
25 policy.

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1 SECTION 5000.5034

2 FEES: FILING, SUBPOENAS, TRANSCRIPTS AND COPIES

3 MR. HELLER: And then with that there's only
4 one section left. It's Section 5000.5034 on page 53,
5 Fees: For Filing, Subpoenas, Transcripts and Copies.

6 With no further comments, thank you all very
7 much for all your help and all your comments --
8 was there a comment?

9 MR. DAVIS: Just -- Brad, Ken -- if you're
10 going to make changes to this part -- part, will you be
11 doing another redlined version?

12 MR. HELLER: If we make changes to Part 5, as
13 we -- from this version, we will prepare an underlined
14 and strikeout version showing what those changes are.
15 And very likely also a clean version with those
16 accepted -- those changes accepted and then will present
17 both those to the Board or the interested parties,
18 depending on what they say.

19 MR. MICHAELS: But based on what we've been
20 working with today --

21 MR. HELLER: Right. We will agree --

22 MR. MICHAELS: -- that will be our -- our new
23 ground zero.

24 MR. HELLER: Correct. Yes, we will treat it as
25 if these changes were accepted and they go from there
26 showing the modifications made from this document.

27 So, it will be treated as if you took the clean
28 version that was -- that's out there today and made

1 changes to that. Those will be the changes that will
2 show in the un -- in the underline and strikeout version
3 that we'll provide.

4 So, you'll be able to track them from step to
5 step to step.

6 And once again, thank you all for coming today.
7 You can feel free to call me if you have any further
8 comments or submit written comments. We appreciate it
9 all and all the input and for your patience today, as
10 well.

11 Thank you.

12 MR. MICHAELS: Well, you did a great job.

13 Thank you.

14 And thanks to the reporters, also.

15 MR. DAVIS: Yes. Thank you

16 MR. HELLER: Thank you.

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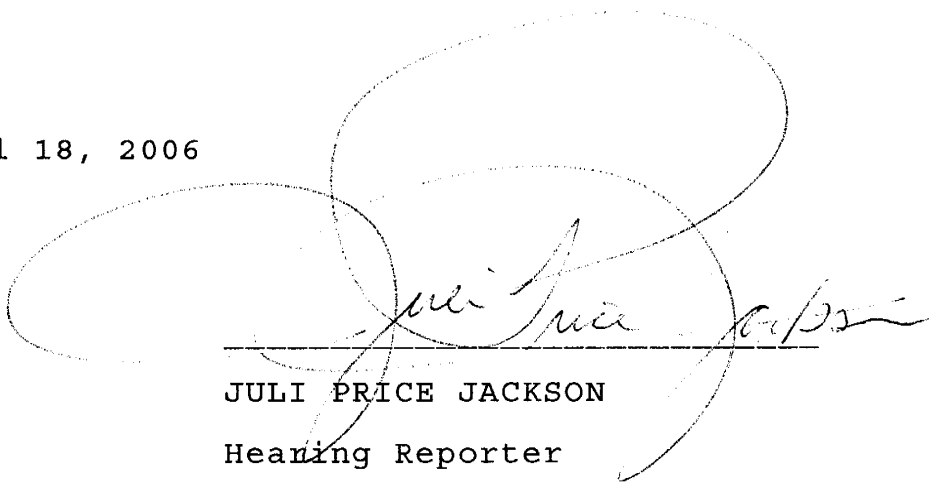
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REPORTER'S CERTIFICATE

State of California)
) ss
County of Sacramento)

I, JULI PRICE JACKSON, Hearing Reporter for the California State Board of Equalization certify that on APRIL 5, 2006 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled hearing; that I transcribed the shorthand writing into typewriting; and that the preceding pages 1 through 25, 53 through 77, 97 through 115, 130 through 161, 183 through 210, and 256 through 287, constitute a complete and accurate transcription of the shorthand writing.

Dated: April 18, 2006



A large, stylized handwritten signature in cursive script, appearing to read 'Juli Price Jackson', is written over a horizontal line. The signature is enclosed within a large, loopy oval shape.

JULI PRICE JACKSON
Hearing Reporter

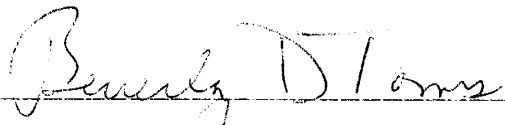
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REPORTER'S CERTIFICATE

State of California)
) ss
County of Sacramento)

I, BEVERLY D. TOMS, Hearing Reporter for the California State Board of Equalization certify that on April 5, 2006 I recorded verbatim, in shorthand, to the best of my ability, the proceedings in the above-entitled meeting; that I transcribed the shorthand writing into typewriting; and that the preceding pages, and pages 26 through 52, pages 78 through 96, pages 116 through 129, pages 162 through 182, pages 211 through 255, and pages 288 through 306 constitute a complete and accurate transcription of the shorthand writing.

Dated: April 18, 2006.


BEVERLY D. TOMS
Hearing Reporter